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MÂLIKI LAW

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Khalil ibn Ishak, al-Jundi

MÂLIKI LAW

Being a Summary from French Translations
of the
MUKHTAṢAR OF SÎDÎ KHALÎL
With Notes and Bibliography

BY

F. H. RUXTON
Political Department,
Nigeria

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PREFACE

THE advantage to be gained by knowing something of the law of the people we govern is self-evident, especially when, as in the case of Muhammadan countries, it is the Law that has moulded the people, and not the people the Law. Again, where, as in the Northern Provinces of Nigeria, it has been the policy of Government to rule indirectly through the native administration, a knowledge of Muhammadan Law is more than ever necessary; giving us, as it does, a clue to many acts, and supplying the mainspring for many motives, on the part of the natives, which otherwise we should fail to understand. The more we can grasp the inward significance of motives and acts, the more sympathetically, and therefore the more efficiently we shall be enabled to administer Muhammadan peoples.

For this reason, the present work will be found to cover practically the whole field of Muhammadan Law, and to contain a summary of the Law on many subjects which seldom come up in Native Courts and could scarcely be dealt with in the Provincial Courts; for example, the purely religious law, the *zakât*, land laws, and the law relating to the enfranchisement of slaves. It is rather to the officer in his executive, than in his judicial capacity, that this book on Mâliki Law is addressed. At the same time every endeavour has been made to meet the requirements of the officer whose duty it is to check the cause lists of Native Courts, and to supervise their procedure; and although it is hoped that a study of the book will enable an officer to discuss general principles with an Alḳali and to steer clear of blunders when dealing with the Native Courts, still, it would perhaps be unsafe, without a serious knowledge of the Arabic text and of its many commentaries, to base thereon a definite conclusion on a point of law. That is not the main object of the book, if only for the reason that the compiler himself is neither an Arabic scholar nor a

lawyer. Happily for us, it is not nice points of law that we have to deal with, but rather with general principles and procedure.

Practically, with no exception, every Muhammadan in British West Africa belongs to the Mâliki School, and it is that law which alone prevails. The texts most in use are the *Mukhtaṣar* of Sîdî Khalîl, the *Risâlah* of Ibn Abû Zaid, and the *Tuḥfat* of Ibn ʿÂṣim, of which the first is the most important and the most complete, and it is on French translations of the *Mukhtaṣar* that the present work is based; translations of the *Risâlah* and of the *Tuḥfat* being used for purposes of annotation. A translation of the *Minhâj al-tâlibin* of Nawawi, the Shâfi'i text most often met with in British East Africa and in Malaya, has also been occasionally used in the hope of making the present English version of assistance to administrators in those countries. Differences that exist between Mâliki and Shâfi'i Law are but of small material importance.

A few words are necessary as to the inception and purport of this book. In April, 1909, Sir Percy Girouard, then our Governor, instructed me to make a translation of Dr. Perron's French version of the *Mukhtaṣar*, *Jurisprudence Musulmane*, a work in seven volumes (Royal 8vo). I had not proceeded far with the 3,858 pages of this work before it became apparent that a mere translation would be beyond the reader's patience and perhaps beyond his comprehension, owing to Dr. Perron's prolixity and redundancy, and lack of concise notes and references. To produce a book that could be read and one that would not become a dusty ornament on the top shelf of Provincial Office libraries, something more than a knowledge of French legal terms was required; a familiarity with the Law itself was a necessity. This I set myself to acquire at the École des Langues Orientales Vivantes, where every facility was furnished me. Later, on the advice of the learned Arabist, M. O. Houdas, I gave preference to Seignette's translation, although but a partial one, over Dr. Perron's. I have added explanatory notes; and in the result the work consists of a summarized adaptation or compilation of the works of Perron, Seignette and Zeys. Thus chapters xiii.-xxxiii. and xxxix.-xlviii., with the exception of chapter xlii., have been summarized from Seignette's *Code Musulman*, whilst chapter lv., on succession, has been rendered from the

French official text-book, M. E. Zeys's *Traité de Droit Musulman*. The sequence of the chapters will be found to correspond with that of the Arabic text of the *Mukhtaṣar*, and, in the case of all rules to which a number is prefixed, its Arabic text can at once be found by referring to the same number in Seignette, where the original is given with the French translation in parallel columns. Most of the notes have been taken from the authorities of which a list is given in the bibliography, and in all such cases the reference is given.

In a law book it is absolutely necessary to use legal terms, but a warning must here be given that in scarcely any case can the terms as employed be given an exact English meaning. The nearest English equivalent has been given, and the exact sense in which the technical term is used must be gathered from the whole context. The reader is further asked to lay aside all preconceived ideas derived from our own law, or based on our notions of what is just or logical. In Muhammadan Law, terminology, principles, procedure, deductions, all differ radically and absolutely from our own; the administrator is therefore advised to gain an insight into the whole law before applying any particular rule.

To my friend, Mr. A. B de Tscharner, of the Middle Temple, for his help in the translation; and to the Arabic scholar, Mr. H. F. Amedroz, for his transliteration of the Arabic terms; my most grateful thanks are due.

F. H. RUXTON.

June, 1914.

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A LIST OF BOOKS BEARING ON MUHAMMADAN LAW, MAINLY OF THE MÂLIKI SCHOOL.

The works which have chiefly been consulted are placed first and the abbreviations by which they are referred to are shown in italics.

Abdur Rahim: ABDUR RAHIM: *The Principles of Mohammedan Jurisprudence according to the Hanafi, Maliki, Shafi'i and Hanbali Schools.* London and Madras, 1911.

Houdas. O. HOUDAS: *L'Islamisme.* Paris, 1904.

Hughes. T. P. HUGHUES: *A Dictionary of Islam.* 1885. A standard work, but long out of print. To be used with caution in Africa, as it is largely based on Persian sources.

Lane. E. W. LANE: *The Manners and Customs of the Modern Egyptians.* (First edition, London, 1836). Fifth edition in 2 vols., 1904. Indispensable. Should be studied by every one before coming into contact with Muhammadans.

Luciani. J. D. LUCIANI: *Traité des Successions Musulmans.* Paris, 1890. An important work on inheritance.

Macdonald. D. B. MACDONALD: *Development of Muslim Theology, Jurisprudence and Constitutional Theory.* London, 1903.

Margoliouth. D. S. MARGOLIOUTH, Laudian Professor of Arabic in the University of Oxford: *Mohammedanism.* Home University Library series.

Minhâj. L. W. C. VAN DEN BERG: *Minhâj At-Ta-libin. Le Guide des Zélés Croyants. Manuel de Jurisprudence Musulmane selon le Rite de Chafi'i. Texte Arabe, publié par ordre du Gouvernement, avec traduction et annotations.* Batavia, 1883. 3 vols. The *Minhâj* is the law book chiefly used in East Africa and Dutch East Indies. Van den Berg's is the only translation, text and translation on same page. The retranslation from Dutch into French is not very satisfactorily carried out.

Morand. M. MORAND: *Études de Droit Musulman.* Algiers, 1910. A series of monographs on the characteristics of certain Muhammadan institutions: family, marriage, evidence, etc.

Muir. SIR WILLIAM MUIR, K.C.S.I.: *The Life of Mahomet.* Third edition, London, 1894.

Perron. DR. PERRON: *Précis de Jurisprudence Musulmane, ou Principes de Législation Musulmane, Civile et Religieuse, selon le Rite Malékite, par Khalîl Ibn-Ishak; traduit par M. Perron.* Paris, 1848. 6 vols. and 1 vol. Index. This work was undertaken under the auspices of the French Government; it contains a complete translation of the *Mukhtaṣar* of Sîdî Khalîl, together with the translation of the explanations of the principal commentators: al-Kharashi, al-Mâziri, al-Zarḳâni, al-Shabrakhîti, incorporated in the text.

Risâlah. A. D. RUSSELL AND ABDULLAH AL-MA' MÛN SUHRAWARDY: *First steps in Muslim Jurisprudence, consisting of excerpts from Bâkûrat-al-S'ad of Ibn Abû Zayd. With Arabic text, English translation, notes and a short historical and bibliographical introduction.* London, 1906. The full Arabic text of the *Risâlah*, or *Bâkurat-al-S'ad*, can be had, chez Leroux, 28, Rue Bonaparte, Paris.

Seignette. N. SEIGNETTE: *Code Musulman.* (*Rite Malékite—Statut Réel*) *Texte Arabe et Nouvelle Traduction.* Constantine, 1878. A good translation of part of the *Mukhtaṣar*, couched in technical language and without commentary or explanations. French and Arabic in parallel columns. The work does not embrace the religious law, taxation and land tenure, nor the law of marriage and divorce. The introduction is particularly good. The book was reprinted in 1911 and can be had through Luzac & Co., London.

Tuḥfat. O. HOUDAS AND F. MARTEL. *Traité de Droit Musulman. Le Tophat d'Ebn Açem: texte arabe avec une traduction française, commentaire juridique, et notes philologiques.* Algiers, 1882. The *Tuḥfat* is a commentary on the *Mukhtaṣar* of Khalîl, and is well known in Northern Nigeria.

Vincent. B. VINCENT: *Études sur la Loi Musulmane.* Paris, 1842. An introduction to the study of Law, giving the principal authors and commentators, followed by a translation of the criminal law extracted from the *Risâlah* of Abû Zaid.

Wilson. SIR ROLAND KNYVET WILSON, BART.: *An Introduction to the Study of Anglo-Muhammadan Law.* London, 1894.

Worms. DR. WORMS: *Recherches sur la Constitution de la Propriété Territoriale dans les Pays Musulmans.* Paris, 1846. According to the learned scholar, Professor O. Houdas, this work is still the best authority on the subject of land tenure. A typewritten copy is in the Kano library.

Zeys. E. ZEYS: *Traité élémentaire de Droit Musulman Algérien* (*École Malékite*). Algiers, 1885. 2 vols. The manual still in use in Algeria.

DR. WORMS: *De la Constitution territoriale des Pays Musulmans.* Extract from the *Revue de Législation et de Jurisprudence*, vol. xv. Paris, 1842. A summary of the author's researches.

DR. WORMS: *Recherches sur la Constitution de la Propriété Territoriale dans les Pays Musulmans. De la Propriété rurale et urbaine en Algérie.* Extract from the *Revue de Législation et de Jurisprudence.* Paris, March, 1844. A short summary of the author's researches, directed chiefly against the proposed legislation on the subject of land tenure in Algeria.

C. RICHARD: *De l'Esprit de la Législation Musulmane.* Algiers, 1849. Advocating assimilation of the races.

G. GILLATE: *Traité de Droit Musulman.* Constantine, 1860. Contains French legislation on the subject of Native Courts, a biography of Sîdî Khalîl, and the personal and commercial law extracted from Perron's translation and d'Ohsson's works.

P. E. BACHE: *Origine et Constitution de la Propriété Arabe en Algérie, avant 1830.* Paris, 1860. (Pamphlet.)

Constitution de la Propriété en Algérie dans les territoires occupés par les Arabes. Senatus-Consulte du 22 Avril 1863, *Réglement d'Administration Publique du 23 Mai* 1863. Paris, 1863. The official text in French and Arabic.

E. ROBE: *Les Lois de la Propriété immobilière en Algérie.* Algiers, 1864.

E. MERCIER: *La Propriété indigène en Maghreb selon l'Ouvrage dit, 'La Règle des Princes et des Khalifes.'* Constantine, N.D.

A. PELTIER: *Chapitre de la Vente de Bokhari.* Algiers, N.D.

F. CADOZ: *Examen critique de la traduction officielle du livre de Khalîl.* Paris, 1870. A criticism of Perron's translation.

M. SAUTAYRA AND E. CHERBONNEAU: *Du Statut personnel et des Successions.* Paris, 1873. 2 vols. A manual of Algerian jurisprudence, containing a summary of the *Mukhtaṣar*, followed by a commentary. The commentary is of special value, as containing the interpretation of the Law as given by modern native jurists, i.e. the judges of the Algerian Courts.

A. GASCONI: *La Propriété au Sénégal.* Paris, 1884. (Pamphlet.) Land tenure in Cayor and the territory of Cape Verd, criticising Government's action in considering the land as Crown lands, and in not indemnifying the people when dispossessing them in order to build Dakar and Rufisque.

E. FAGNAN: *Concordance du Manuel de Droit de Sîdî Khalîl.* Algiers, 1889. A concordance of the Arabic text of the *Mukhtaṣar* of Khalîl.

M. MARÇAIS: *Des Parents successibles en Droit Musulman.* A standard work on the subject of inheritance.

E. MERCIER: *Le Hobous ou Ouakoff: ses règles et sa jurisprudence.* Algiers.

E. MERCIER: *La Propriété en Maghreb. Journal Asiatique;* July-August, 1894. Showing the legal principles underlying land tenure in North Africa.

IBN EL-IMAM: *Des Droits et Obligations entre propriétaires d'héritages voisins. Traduit de l'Arabe par M. Barbier.* Algiers. On the law of pre-emption.

SÎDÎ KHALÎL: *Précis de Jurisprudence Musulmane suivant le Rite Malékite. Publié par les soins de la Société Asiatique.* Paris, 1905. New edition. This, the best Arabic text of Sîdî Khalîl, was printed in maghribi script, principally from a MS. that had been copied in Granada in A.D. 1473. The original MS. is now in the Bibliothèque Nationale.

E. FAGNAN: *Sîdî Khalîl. Mariage et Répudiation. Traduction avec Commentaires.* Algiers, 1909.

W. F. GOWERS: *Notes on Muhammadan Law in Northern Nigeria. Being extracts mainly from the Risâlah of Abu Muhammad Ibn Abu Zayd translated into Hausa.* Zungeru, 1908. (Pamphlet.) The *Risâlah* is one of the oldest works of the Mâliki School; its author died in A.H. 389. The *Risâlah* is a commentary on the *Muwaṭṭa'* of Mâlik; an Oriental edition of this latter work has been printed in Cairo.

H. R. ABDUL MAJID: *An Historical Study of Mohammedan Law.* London, 1911. (Pamphlet.) Deals with the first two periods in the development of Muhammadan Law, i.e. from A.H. 1 to 40.

E. ZEYS AND SÎDÎ SAID: *Recueil d'Actes et de Jugements.* Algiers, 1886. A useful little book giving the Arabic text in maghribi script, together with translation, of various legal forms in common use.

C. BROCKELMANN: *Geschichte der arabischen Litteratur.* Weimar, 1899. 2 vols.

A. D. RUSSELL AND AL-MA'MUN SUHRAWARDY: *A Manual of the Law of Marriage from the Mukhtaṣar of Sîdî Khalîl.* London, 1913.

E. FAGNAN: *Risala ou Traité abrégé de Droit Malékite et Morale Musulmane.* 1914. A full translation of the *Risâlah* of Ibn Abû Zaid.

DR. HOUTSMA AND PROFESSOR ARNOLD: *Encyclopædia of Islam. A dictionary of the Geography, Ethnography and Biography of the Mohammedan peoples. Prepared by a number of leading Orientalists under the supervision of Dr. W. M. Houtsma and Professor Arnold.* Leyden. 3 vols. In course of publication.

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INTRODUCTION [1]

I

MUHAMMADAN Law in all its detail, religious as well as civil, has for us an immense interest. It necessitates the study of the social institutions of a people which an immutable law has, for twelve and a half centuries, moulded and re-moulded at frequent intervals. For here it has been neither the nation nor the people which has made the Law ; it is the Law which has made and moulded the nation and the people. Both the outer form and the inner spirit bear the impress of the one word :—Religion.

In Islâm [2] there is but one Law, there is but the Law and it is the Religious Law, signified in the word *Sharî'ah* [3]. In other words it is the only supreme Law ; for it emanates from God, who decreed its main bases in the Korân. With Muhammadans the law is also dogma.

All other law is of human origin and belongs therefore to the category of regulations or government orders emanating from temporary authority. These regulations should, in principle, rigorously respect the dispositions and intentions of the *Sharî'ah* [4].

[1] It should be remembered that this Introduction was written by Dr. Perron only seventeen years after the taking of Algiers by the French in 1830. This was the first time that a European nation had come into contact with people of the Mâliki School.

For other introductions to the study of Muhammadan Law, the student is referred to *Code Mussulman, Rite Malékite*, by N. Seignette, a reprint of which came out in 1911, and to which is prefixed an excellent introduction. Also to *An Introduction to the Study of Anglo-Muhammadan Law*, by Sir R. K. Wilson. The first seventy pages give a brief summary of the early history of Islâm and the rise of its jurisprudence. *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, by Duncan Macdonald. A useful book covering a wide field. Hughes's *Dictionary of Islam* ; article on Law. *Muhammadan Jurisprudence*, by Abdur Rahim. Though this work does not specially refer to Mâliki Law, it traces the growth and sources of Law in a clear and able manner. *A Historical Study of Muhammadan Law*, by Syed H. R. Abdul Majid, which traces the sources of Law during the first forty years of the Hijra.

[2] 'Islâm is the infinitive, and Muslim . . . the participle, of a verb which signifies " to deliver " or " to commit entirely " some thing or person to some one else. . . . Hence the words are equivalent to " monotheism " and " monotheist "'. (D. S. Margoliouth, *Mohammadanism*, p. 7.)

[3] The *Sharî'ah* includes both the teachings of the Korân and the traditional sayings of Muḥammad, *Ḥadîth*.

[4] It would appear from the histories of Muhammadan States that whenever the Ruler has departed from the Sharî'ah in his governance of the State, reaction is bound to occur. The most notable of such reactions is that under the great Emperor Akbar's successors, Jehanghir and Shah Jehan, culminating in the complete reversal of Akbar's policy under Aurungzib in A.D. 1656.

II

I have said that the Law stands alone. Nevertheless, in its application, two great divisions, which correspond with the two predominant features of human existence, have been established. These two features of human life are its present and its future, and are expressed by the Civil Law and the religious or Canon Law.

The religious, or first division of the Law, includes [1] the *'Ibâda* or religious practices, which regulate the religious life of Muhammadans; these may be considered, in so far as one can apply such terms to Islamism, as the liturgy or cult. This liturgy is almost entirely concerned with the detail of personal acts; it prescribes precepts for ablutions, hygiene, etc., and is often found mixed up with rules of general policy, administration of Law, moral welfare, astronomical science, etc.

The second division or the Civil Law includes the *Mu-'âmalât* or transactions; that is to say the civil acts or principles which regulate the conduct of Muhammadans in social life and which defines their duties towards other members of society. It is the true civil law, the law of daily conduct, always dominated and inspired by religious thought or principle.

It is of the utmost importance to study and to know the circumstances under which the religious law regulates or governs the validity of many civil acts. In a religion which inspires the whole of society and permeates all law, the Courts must decide many purely civil cases with reference to the Canon Law; thus a sale must be declared void if concluded at the hour of the Friday prayer.

III

Before, but nevertheless quite outside all dispositions, prescriptions, decisions, prohibitions or approbations of the law, there is dogma, that is, the basis of the faith: the formulated principles which constitute Islamic orthodoxy, considered as revelation. This is what Muhammadans call *al-Dîn* [2], the Religion, to distinguish it from *al-Sharî'ah*. But dogma is not circumscribed by defined or precise limits; the articles or propositions of which it is composed belong both to the law and to dogma. The same may be said of the rules concerning

[1] *Al-Sharî'ah* is divided by Muslim jurists into five sections: *'Uḳûdât*, belief; *Adab*, moralities; *'Ibâdah*, devotions; *Mu'âmalât*, transactions; and *'Uḳûbât*, punishments. The two common divisions are: *'Ilm al-Kalâm*, embracing all matters of faith, and *'Ilm al-fiḳh*, which includes all matters of practice as distinguished from articles of Faith. (Hughes.) *Kalâm* may be rendered 'scholastic theology,' and *Fiḳh* 'canon law'. (Macdonald, pp. 147, 245.)

[2] The word used by Muslims themselves for their religion (*dîn*) is Islâm or resignation to the will of God. It consists in the observance of the five duties: (1) Bearing witness that there is but one God, i.e. the *Taḥlîl*, '*La Ilaha Illa Llah.*' (2) Reciting the daily prayers, *Ṣalât*. (3) Giving the legal alms, *Zakât*. (4) Observing the *Ramadhân*, or month's fast. (5) Making the pilgrimage to Mecca once in a lifetime. (Hughes.)

moral conduct ; they are disseminated throughout the religious as well as the civil jurisprudence.

Dogma consists of a series of forty-eight propositions, some of which afford no important deduction for the believer or only enter into simple legal prescriptions or present instructions of an indifferent character or indicate a formula of Aristotelian logic or throw themselves back into the secondary beliefs of Judaism or recall principles of the Christian dogma. In a word the whole basis of Islâm presents an inconceivable incoherence.[1]

From what has just been said it will be seen that Muhammadan law is dogma erected into law, and that the first part includes injunctions and prohibitions indispensable to the validity of the practices imposed upon or counselled for the Faithful, considered either as imprescriptable duties or as meritorious works.

As to the value of voluntary or involuntary shortcomings in the detail of religious acts, and touching the intrinsic value of the detail of those acts, everything is appreciated from the point of view of culpability or non-culpability. Here again we see the characteristic spirit of Islâm.

The Law sets forth those practices which are of divine or indispensable obligation, the practices of canonical obligation and the practices of imitative obligation, that is those consecrated by the example of the Prophet. These are the three great divisions. Following them are the permitted practices, meritorious or conventional practices, etc.[2]

[1] The student is referred to Macdonald's *Muslim Theology* for a concise study of the subject. The number of propositions or articles of belief, *'aḳîdah*, is not necessarily forty eight. In Muḥammad Al-Fudali's creed, translated by Macdonald, p. 315, fifty articles are recited.

[2] These distinctions are clearly stated in Hughes's *Dictionary of Islam* :—

I. *Mashrû'*—Lawful.

(1) *Farḍ*, that which is proved beyond all doubt to have been enjoined, either in the Korân or in a tradition of undoubted authority, and the denial or disobedience of which is positive infidelity [a].

(2) *Wâjib*, that which is obligatory, but of which there is some doubt whether or not it was enjoined in the Korân or in a tradition of undoubted authority.

(3) *Sunnah*, that which was practised by Muḥammad.

(4) *Mustaḥabb*, that which Muḥammad and his companions sometimes did and sometimes omitted [b].

(5) *Muḥabb*, that which is desirable, but which may be omitted without fear of sin.

II. *Ghair al-mashrû'*,—Unlawful.

(1) *Mufsid*, that which is most vicious and corrupting, a mortal sin.[c]

(2) *Haram*, that which is distinctly forbidden.

(3) *Makrûh*, that which is generally held to be unclean.[d]

[a] Shortly : an ordinance of the Prophet and therefore of God.

[b] Dozy renders : a generally approved act, but not actually enjoined by the Law.

[c] Hence : a depraved mischievous person.

[d] Or : an act reprehensible, though short of actually unlawful.

IV

In the study or analysis of, so to say, the very body and soul of a people, no single point can be a matter of indifference, nor can the examination of its social institutions be neglected, whose principles enclose the secret or explanation of what it has been, of what it is, and of what it may become. Even the minor details of Islamic Law are symptomatic of the character of the Muhammadan, as expressed in his thoughts, his judgments and beliefs, in his individual and public life and in his political institutions.

Where one expects it the least, the law of Islâm too often betrays the state of its society. Thus, in the matter of inhumations during pestilence, it determines human value, and classifies before God and before man the relative physical and moral capacity of mankind.[1]

After laying down the rules for funeral ceremonies, inhumations and burials, there follows the law on *zakât*, the tax upon personal property. This question of taxation is of great importance to Algeria and will furnish, it is hoped, sufficient detail on which to base the scheme of taxation about to be initiated in that Colony.[2] For this reason special attention has been given to its study, by extracting from the commentators all possible information touching the method of the application of this tax and the method of its collection. There is every reason to believe that we can base both the assessment and the collection of the *zakât* upon the details established by the law. And in this term *zakât* is included the *'ushr* which is more particularly the *zakât* on grains and fruits: an impost which is exactly rendered by the word 'tithe.'

In many other matters, however, laws which in the first instance might seem to be matters of indifference to us would appear to demand replacement or modification so as to conform with the French law. Thus in certain cases—*inter alia*, apostasy and the deliberate failure to practise obligatory daily prayer—the Law permits the death penalty to be inflicted and carried out, even by the people themselves without the intervention of the Courts. The Law also forbids, in general terms, the exhumation or autopsy of the dead; it permits burial in private houses; and it recommends immediate burial after death, and that graves shall have but the smallest depth, etc. In these circumstances and in many others, mainly falling within the

[1] A pessimistic view of the law of Islâm is that of Sir R. K. Wilson in his *Introduction to the Study of Anglo-Mohammedan Law* p. 87:—'The laws of Islâm, taken in the lump, the only way in which their alleged sacred origin allowed them to be taken, and chiefly because they could only be so taken, were bad anywhere and for any community, and became worse and worse the further they were transplanted from their original surroundings; worse under the Caliphate of Bagdad than at Medina under the "rightly directed" Caliphs, and worse for Hindus of the eighteenth century than for Bagdad in the ninth.'

[2] This hope of Dr. Perron's never materialised.

religious law, it will be necessary to substitute French law, and to convince Muhammadans of its good intentions and humanity, whereby it is sought to secure the good of all, to ensure public security, and to maintain the rights of criminal justice and of medical jurisprudence.[1]

In all this religious or canon law, a knowledge of which may appear to be useless from our point of view, there will, however, be found important principles: principles which must be respected, modified, or determined, both for the good of the Colony and to allow for the genesis and development amongst the Arabs of ideas more in harmony with those of the civilized world.

V

The legal rules that go to make up the whole of Muhammadan jurisprudence are to be found complete in each of four collections. These four collections are recognized as orthodox[2] because they are thoroughly in accord with the traditions and with the Korân.

The Muhammadan Pandects or *Fatâwa*, that is to say, legal decisions

[1] In the matter of substituting French—or English—law for the laws of the peoples we govern, it may be of interest to summarize a speech by a Turkish diplomatist, H. E. Savvas Pasha, given before the Société des Etudes Coloniales, on January 28, 1892. Speaking of the means to be employed by a Christian power in order to modify the conscientious objections of their Muhammadan subjects, he said:—

(*a*) Their personal status should never be touched by the governing power. There should be no appeal in these matters to Government Courts.

(*b*) The Islamic Forum should be re-introduced: the Judge (Ḳâḍi); the juris-consult-pretor (Mufti), he who assists the Ḳâḍi and expounds the law, supplying him with *fatâwa* or decisions; the court of doctrinal counsel, *Bab al-fatâwa*.

(*c*) Commercial causes between Muhammadans should for a long time yet be left to the Native Courts. If one party desires, though a Muhammadan, to take his case before the Government Court, he can do so; but the other party can then lodge a complaint against him before the Native Court.

(*d*) Criminal cases should on no account be left to any other than the Government Courts. Should Muhammadans not like the Criminal Law of the Christians, all they have to do is not to commit crimes.

(*e*) In time, commercial causes will have to be tried in the Government Courts. Justice, apart from the personal status of Muhammadans, must be one and the same for all. Before this can be realized, our law must be Islamised. By this is meant the process of rendering the rules of law of the Governing Power conformable to the juridical concepts of Islâm, by demonstrating that they are not contrary to the fundamental principles of Muhammadan Law and that their introduction is called for by the needs of the age. The Prophet himself foresaw the need for modification. Adoption is thus allowable, even recommended; it must, however, be done in conformity with the methods of Islâm, its orthodox rules and procedure. . . . One last recommendation: study well Muhammadan Law. If their Law is not thoroughly well known and understood, Muhammadans can only be governed by physical force.

[2] The orthodox sect of Islâm is the Sunni, comprising the four orthodox Schools of Ḥanafi, Mâliki, Shâfi'i and Ḥanbali. See p. 7. The word 'Sunni' literally means 'one of the path,' a traditionalist. (Hughes.) See p. 7, note 1.

which have become principles of law, or, according to the more strictly Muhammadan idea, decisions which are the expression of the will and meaning of the law, were not collected together before the second century of the Hijra. Up till then the text of the Korân and the counsels, precepts, practices, decisions or judgments of Muḥammad were the only guide in all questions of canon and civil law.

In the time of Abû-Bakr [1] there was no written law; the *Aṣḥâb* [2] or original disciples [3] were the judges, legal councillors and jury in all matters that came before his tribunal. Whenever these *Aṣḥâb* failed to give a positive indication of the law, Abu Bakr began to take the spirit of the Korân as his guide, or decided cases by analogy [4], or by the consensus of opinion [5]. On the succession of Omar as Caliph,[6] a period of conquest set in. The *Aṣḥâb* became scattered throughout the new dominions of the Arabs, and, with them, the basis and principles of jurisprudence. Then it was that it became necessary to make written collections of the legal traditions which the *Aṣḥâb* and their disciples had learnt, guarded, and transmitted. Special studies were begun, of which the first outcome was that of Muḥammad b. Shihâb al-Zuhri [7].

From this period the study of the Law could be and was expanded. Jurisconsults gradually arose who elucidated the principles of jurisprudence, extending at the same time their application and bearing, and distinguishing the real from the spurious; thus, as it were, defining the limits of civil and religious orthodoxy. Many *Tâbi'un* and scholars made long voyages in order to clear up and elucidate any tradition which might be made the basis of a principle of Law.

In the second century of the Hijrah, the Caliph Hârûn al-Rashîd devoted much attention to the establishment of justice; and, as from the year A.H. 170, when he installed in the supreme seat of justice Abû-Yûsuf-Ya'ûb-b. Ibrâhîm [8]—a disciple of Abû-Ḥanîfa, the author of the first of the four orthodox collections followed to this day [9]—he confined his selection of candidates for the office of judge or magistrate in any portion of his empire solely to men instructed in the Law, and likewise chosen by Abû-Yûsuf.

[1] The first of the 'rightly directed' Caliphs. A.H. 632–634.

[2] *Aṣḥâb*, pl. of *Ṣaḥâbi*, fem. *Ṣaḥâbiya*, an associate. The number of people entitled to this distinction is said to have been 144,000. (Hughes.)

[3] The disciples of the original disciples are known as *Tâbi'un*.

[4] *Kiyâs*. [5] *Ijmâ'*. [6] A.H. 634–644.

[7] Died, A.H. 124. (Macdonald, p. 91.)

[8] Abû-Yûsuf, born A.H. 113, died A.H. 182. See Night 296, *The Thousand and One Nights*, and Colonel Osborn's *Khalifs of Bagdad*, Ch. I, for stories illustrative of the logic by which he managed to reach the conclusions desired by his Imperial Master. (Wilson, p. 32; Macdonald, p. 97.)

[9] No writings of Hanîfa himself have reached us. (Macdonald, p. 96.) The collection referred to by Dr. Perron is that of the *Hidâya*, compiled about A.D. 1196.

In Spain, in the reign of al-Ḥakm, Yaḥya, who, whilst making the pilgrimage had become a follower of Mâlik, returned to Spain with a fully matured knowledge of the Law. He was soon surrounded by so considerable a number of followers that al-Ḥakm was wont to rely entirely upon his judgment when making appointments to the judiciary. In consequence Spain abandoned the Ḥanafi law in favour of that of Mâlik. By the year A.H. 240, all Muhammadan Africa, with the exception of Egypt, had accepted the Law of the Mâliki School.

VI

The four orthodox[1] Schools which survive in Islam to this day are denoted by the names of their founders :—Ḥanafi, Shâfi'i, Mâlik, and Ḥanbali.

Abû-Ḥanîfa, surnamed the great Imâm, was born at Kufa in the year A.H. 80, and died at Bagdad.[2]

In the year A.H. 150 (A.D. 768), the Imâm Muḥammad as-Shâfi'i was born at Askalon in Syria. He died in A.H. 204 (A.D. 826) in Egypt.[3]

The Imâm Mâlik b. Anas was the author of the *Muwaṭṭâ*[4], a work founded upon the traditions received from the Prophet and containing all the fundamental principles of the Mâliki School. Mâlik, son of Anas, was born at Medina in A.H. 94, and died in A.H. 179 (A.D. 812), in the reign of Hârûn al-Rashîd.

The Imâm Aḥmad b. Ḥanbal was celebrated for his knowledge of science and for his piety. His School has but few followers to-day.[5] He died at Bagdad in A.H. 241 (A.D. 863).

[1] The Arabic equivalent for orthodox is *Sunni*, 'one of the path.' The word comes from *sunnah*, which, in ordinary language, means 'the way,' 'custom,' or in jurisprudence, what has emanated from the Prophet, either with respect to his actions, his words, or his tacit approbation. (Vincent.)

Generally speaking, Islâm is divided into Sunni and Shi'a, the former greatly outnumbering the latter. It is only in Persia that the Shi'a sect dominates.

[2] Abû-Ḥanîfa died in A.D. 768. (Wilson, p. 30.) The Ḥanafi School holds sway over the Turkish Empire, in Northern India, Central Asia and Southern Russia. The *Hidâyah* is the best known book of this School.

[3] The Shâfi'i school is predominant in the Malay Archipelago, East Africa, Lower Egypt, and in parts of Southern India. The most widely known books of this school at present in use are :—the *Mukhtaṣar* of Abû-Shujâ', the *Muḥarrar* of Abû-l-Kâsim, and the *Minhâj al-ṭâlibîn* ; the last being the most widely disseminated and the code most generally in the hands of Ḳâḍis, whether in East Africa or in Java.

[4] *Muwaṭṭâ*, 'the beaten path'. (Wilson, p. 34.) It is the earliest compilation of traditions. It is not *jâmi*, that is, arranged in any order under various heads, as are the compilations of the *Ṣaḥîḥain*, the *Ṣaḥîḥ al-Bukhâri* and the *Ṣaḥîḥ Muslim*. It is doubtful whether there is extant any copy of the *Muwaṭṭâ*.

[5] Practically only the Wahhabites in Central Arabia are Ḥanbalites. (Macdonald, p. 115.)

VII

The Imâm Mâlik, the founder of the School with which we [1] are mainly concerned, was a disciple of the *tâbi'un* [2].

Mâlik collected the results of his researches, studies, and reflections, and embodied them in a work which he called *al-Muwaṭṭâ*. Tradition has it that when the work had been completed, Mâlik, not having decided upon its title, saw in a vision the Prophet who said to him :— '*Waṭṭa'ta al-Dîn*,' 'thou hast marked out the path of the Law'; and from this Mâlik styled his book as above, meaning :—'that which is made clear.' [3]

The principles laid down in the work of Mâlik formed the basis of his teaching to his followers. The book itself, however, was not of any great length. The lessons which Mâlik imparted over long years were collected by his disciples; some of whom, by means of commentaries, further expanded his instructions; while others constructed special digests, which were the ordinary codes used in the Courts until the eighth century of the Hijrah. At this period, Khalîl, so well known throughout North Africa and the whole of the Muhammadan Sudan under the simple name of Sîdî Khalîl, composed his *Mukhtaṣar*, or précis of jurisprudence, in accordance with the teaching of the School founded by the Imâm Mâlik. The codes of law of the earliest jurists of the Mâliki School are seven in number, of which four are considered to have the most importance. Of these, the *Mudawwanah* [4], frequently quoted by Khalîl, is the principal, and is accepted as the highest authority of all the ancient digests.

Amongst other jurists that made names for themselves in the study of Law prior to Khalîl, may be mentioned Ibn-al-Ḥâjib; Abû-Muḥammad b. Abû-Zaid [5] of Ḳairawân, where he died in A.H. 390, and whose fame as a law-giver earned for him the name of the 'Little Mâlik' [6]; and Ibn-Farḥûn of Medina, the author of rules of procedure for judges, who died in the year A.H. 779.

But the jurists held most in reverence and most frequently quoted

[1] i.e. in Algeria, Morocco and the Western Sudan.

[2] See p. 6, note 3.

[3] See p. 7, note 4.

[4] By 'Abd-al-Raḥmân b. al-Ḳâsim b. Kinâna.

[5] Though Dr. Perron does not mention it in his text, this jurist would appear to be identical with the author of the *Risâlah*, a work generally known throughout the Western Sudan.

[6] Abû-Zaid al-Ḳairawâni, a famous scholar of Ḳairawân, where he taught and where he died in A.H. 389 or 390. His contemporaries called him, on account of his science, the 'lesser Mâlik.' He is supposed to have written more than a hundred books. But it is to his *Risâlah* that his renown is due, and of all the elementary works of the School, it is undoubtedly the most classical. He made this book at once a catechism, an elementary text book of legislation, and a summary of great authority. One would look in vain for another work of which so many copies are in existence, and perhaps also, a work that has produced so many commentaries. (Vincent.)

by Khalîl are :—Al-Lakhmî [1], a celebrated jurist of the fifth century of the Hijrah, who died in the year A.H. 478 ; Ibn-Yûnus, the Imâm Abû-Bakr Muḥammad b. 'Abd-Allâh b. Yûnus, a Sicilian of the tribe of the Tamîm, who, celebrated by his birth, generosity, and knowledge of the Law, died in the year A.H. 451 ; Ibn-Rushd, the Imâm Abû-l-Walîd Muḥammad b. Ahmad b. Rushd [2] of Cordova, who studied the sciences of theology and law in Spain and Morocco, and who died in the year A.H. 520 ; and the Imâm Abû 'AbdAllah Muḥammad b.'Ali b. Omar, who is also commonly known as al-Mâziri, from the name of a town in the Island of Sicily. He became Imâm in Barca, the ancient Pentapolis, and died in the year A.H. 536.

VIII

Khalîl b. Isḥaḳ b. Yâ 'ûb, the author of the précis of jurisprudence which forms the subject matter of this book, is, in certain works, spoken of as Khalîl b. Isḥaḳ b. Shu'aib. According to Ibn-Hadjar, his real name was Muḥammad, and the name 'Khalîl' was merely a qualifying term signifying 'friend.'

Khalîl, commonly known throughout North Africa as 'Sîdî Khalîl,' or 'the Master,' was surnamed 'Ḍia'-al-Dîn,' or the 'Renowned of the Religion and of the Religious Law.' In Cairo he taught law, tradition, and grammar. Through his teaching, as also through his sound judgment and wisdom, of which he gave great proof in all questions of law, Khalîl acquired a great reputation and rose to the first rank among the '*Ulamâ*' of Egypt. His piety merited the veneration of all, whilst his profound and unceasing studies gave to his work paramount authority throughout four centuries ; even to this day the respect attached to his name and to his knowledge is ever living and still the same. Throughout North Africa, the Arabs swear by two names only :—the celebrated al-Bukhâri, the collector and commentator of the traditional words received from the Prophet, and Sîdî Khalîl.

Khalîl was the author of several works. He composed six volumes of commentaries upon Ibn-al-Ḥâjib, to whom we owe several works of law at one time classic. He wrote a further commentary upon Ibn-'Abd-al-Salâm ; a guide for the proper observances of the pilgrimage ; a biography of his professor, al-Manûfi, who died in A.H. 749 ; and a commentary upon a portion of the *Mudawwanah*. Khalîl is also the

[1] Abû l. Ḥasan 'Ali b. Muḥammad al-Rabaʿî, known as al-Lakhmî, because he was son of the daughter of the jurist of that name. He studied under Ibn-Muḥarriz and Abû l. Fadl b. Khaldûn and al-Saiwari. He gave numerous legal opinions and was al-Mâziri's teacher amongst others. He lived in Sfax to an advanced old age and was considered the head of learning in Africa. (*Târîkh al-Islâm* of Dhahabi. MS. British Museum. Or. 163b.)

[2] Grandfather of the great philosopher Averrhoes, who died A.H. 597.

author of the *Taudi*[1], a work which has spread to both the west and the east, and which was, for a long time, the guide and inspiring influence of Mâliki jurists.

But the work at once the most widely circulated and the most revered, which has come from the pen of Khalîl, is the *Mukhtaṣar*. Khalîl devoted twenty-five years to its composition. 'The *Mukhtaṣar*,' says al-Râzi, 'is a thing precious above all; it is a book which should be read with great assiduity, and one which has become to all men of learning the object of study; . . . it is unique in character, and no one has ever composed another to compare with it.'

When Khalîl died[2] the manuscript of the *Mukhtaṣar* was complete up to the chapter upon marriage, or about one third of the work. The remainder was found among his possessions, either on separate sheets, or in the form of unedited copy. His disciples added the remainder, thus recovered, to what had already been finally put together by him; and, in this manner, the book was finished.

IX

No treatise on Muhammadan Law has, as yet, in so far as I know, been translated in its entirety into French, or in fact, into any European language, Turkish always excepted. The English translation (the work of Anderson and Hamilton: London 1791) of the *Hidâyah*, which is based on the Ḥanafi School, is a chaos of prolixity and confusion. Several works have been translated in part while others have been consulted by authors, who, under general titles, have published works in which Muhammadan laws and customs have been reviewed; but all this activity has been entirely confined to the Ḥanafi School. Upon the Mâliki School little or nothing is being done, and, in Algeria, it has been necessary for Europeans largely to depend upon such works of the Ḥanafi School as were available. The Ḥanafi School, however, is not followed in any part of Africa[3] and is, moreover, much less explicit and less extensive in its provisions than the Mâliki School. In this respect, I would only compare the chapter upon Assessment (*zakât*), as presented by Khalîl, with other works upon the same subject.

X

The translation of the *Mukhtaṣar* has been a matter of great difficulty; indeed, it is impossible to imagine the degree of obscurity—

[1] The name of this work is spelt as given by Dr. Perron, but it cannot be traced in the *Târîkh al-Islâm*.

[2] In A.H. 776, or A.D. 1374, that is, well over one hundred years before the fall of Granada and the final evacuation of Spain by the Beni Nasr. It was in Granada that the best text of the *Mukhtaṣar* was found.

[3] The Ḥanafi School was, however, that of the Turks when they were the dominant power in North Africa. In the matter of the land laws, they appear to have adopted the Mâliki Code in their dealings with the natives, as it suited them best.

the enigmatical and almost unreadable character—which the author of this book attained in his writings.[1] If he did devote twenty-five years to its composition, he certainly appears to have passed half that time in making himself difficult and obscure and unreadable, in so far as his style is concerned. Tacitus and many other authors among the ancients who made reputations for brevity in style, and even for obscurity, were but novices if they be compared with Khalîl.

It is said that in Algeria the people do not fear to place the *Mukhtaṣar* [2] in our hands in its original condition, so certain are they that no European, however well versed in Arabic, will really be able to get at the meaning of a single phrase. There is one circumstance which may perhaps mitigate such exaggerated brevity : the book was composed with a view to its being committed to memory.

XI

The success of Khalîl's code was immense. In the words of the Mufti of Algiers ; 'Khalîl's code contains about one hundred thousand explicit propositions of Law, and about one hundred thousand implicit propositions. . . . Over twenty commentaries have been written upon the book ; but by reason of the difficulty of clearly following Khalîl, its sense can only be gathered by a man endowed with penetration, a high degree of intelligence, and a thorough grounding in the learning of the Arabs. The scholar who has attained such knowledge has the right to be proud, for he may be accorded a place in the front rank of *'Ulamâ'* of the greatest learning. In a word, Khalîl's work is, to-day, the most classic obtainable in any country.'

XII

It is hardly necessary to state that it was by means of commentaries that I undertook the translation of the *Mukhtaṣar*. As soon as I was entrusted with the work, I sought to procure from the Royal Library [3] those commentaries which appeared to me to be indispensable.

[1] The celebrity which this manual has acquired is mostly due to its extreme concision, a concision thanks to which the author has been able to touch upon nearly every point of law, but at the expense of intelligibility and to the profit of those numerous scholars who have made themselves his commentators. (E. Fagnan, *Concordances.*)

The style in which the *Mukhtaṣar* is written is in truth one of extreme concision. To this, the genius of the Arabic language lends itself in a marvellous manner, and the author has even exaggerated this natural concision of language by adopting a particular and altogether conventional system of his own, of which he gives the key in his introduction. (Seignette, p. XIX.)

[2] The Arabic text of 252 pages, Demy 8vo, can be had from M. Leroux, 21, Rue Bonaparte, Paris ; price 6 francs. The Arabic text of the *Risâlah* is also to be had at the same library. The Arabic text of the *Tuhfat* is printed together with Houdas and Martel's translation published by Gavault Saint-Lager, 2 Rue Bab-Azoun, Algiers.

[3] Now the Bibliothèque Nationale, Paris, where the best Arabic text is to be seen.

Unfortunately, the Library did not contain many works of the Mâliki School. I found, however, an excellent text of the *Mukhtaṣar*, dated at Granada in A.H. 877, but of commentaries [1] I could not find a single complete one. The first volumes of certain works I did discover, and in other cases odd volumes. With these I set to work while waiting for certain Arab manuscripts from Egypt; among others, a most useful one in six large volumes by 'Abd-al-Bâki-al-Zurḳâni, and the smaller commentary of al-Kharashi. Both of these works in manuscript were in a good state of preservation, and the writing was very legible. They are considered to be, perhaps, the two most important commentaries of the Mâliki School. Finally I received a volume of the commentaries of Ibrahim-al-Shabrakhîti.[2]

Notwithstanding the help afforded by these commentaries, the meaning of the text is, at times, very obscure [3]; more particularly in the details of religious practices.

XIII

In order to follow the reasoning and intention of the principles of a system of law, so strange to us as is that of Islâm, it is indispensable to add to the actual text some explanations and examples of its actual application, and to introduce those elucidations which have been found to be necessary for Muhammadans themselves; *a fortiori* such aids are necessary for Christians also. Each time that it has seemed to me necessary to add to the actual translation of the text even a few lines or a few words extracted from Arab commentators, I have inserted them in the body of the original in such a manner that both the text and my intercalations make regular reading as if coming from one text. However, in order to distinguish the portions obtained from the commentaries, I have always placed such extracts between brackets [4]. I have sought to be as sparing as possible in these additions, more particularly in those sections or questions which appear to me to be less important for us to understand in detail. In

[1] There are more than seventy commentaries on the *Mukhtaṣar*, the most important being those of Bâhram, 'Ali al-Ujhûri, al-Kharashi, al-Zurḳâni (a), al-Dardîr, al-Râzi, al-Bannânî, al-Amîr, al-Shabrakhîti. Some of these have been in turn commentated by others, thus al-Dardîr by al-Dasûkî (Zeys, pp. x. xi). Al-Tazakhti, *Alḳali* of Katsena in Nigeria in the sixteenth century, was another celebrated commentator of the *Mukhtaṣar* (*Târîkh es-Sûdân*; Houdas' translation, p. 64, and *Un essai sur la littérature arabe au Soudan* by Cherbonneau, p. 18).

[2] All these are well known to the Alkalis of Northern Nigeria.

[3] As an example: in order to say that a demand in marriage must be made before a few persons only, but that the contract must have a large amount of publicity, Khalîl uses but four words and two affixes. (Zeys. p. x.)

[4] These brackets have not been retained in this summarized rendering of Dr. Perron's French text.

(a) Author of the *Ṣafwa*, died A.D. 1688. (Brockelmann: *Geschichte der arabischen Litteratur*. II. p. 318.)

other places, as in the chapter on *zakât*, and in all questions of civil law, I have given as full detail as possible.

XIV

Certain further explanations and notes have appeared to me to be necessary, but as these have not been extracted from the commentaries, I have placed them in a series of notes at the end of each volume.[1]

In so far as the distribution of the subject matter of the book is concerned, I have retained it in its general sense. I have, however, added to those chapters and sections, which lack headings in the original text, their appropriate names. I have also divided the chapters into sections, not always indicated by Khalîl, and at times, the sections into sub-sections; and finally most of the sections into paragraphs. I have given to these divisions and subdivisions their appropriate headings.[2]

This arrangement has appeared to me to be needful, in order to work out an index, and thus facilitate the looking up of any particular question in detail.

PERRON.

PARIS, 1847.

[1] A selection of Dr. Perron's notes are herein given as footnotes.

[2] Except in chaps. vi–viii, xviii and xxxv, these section and sub-section headings have been given, even when the text itself has been omitted through its being of no practical value.

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THE MUKHTAṢAR

OF

SHAIKH KHALÎL B. ISḤAḲ

ACCORDING TO THE SCHOOL OF

THE IMÂM MÂLIK B. ANAS.

INVOCATION

IN the name of the merciful and just God: May God bestow His benedictions and grace upon our Lord Muḥammad, upon his family, and upon his disciples:[1]

The servant of God; he who has need of the mercy of the Lord, he who has seen, with extreme grief, the little he has been able to acquire, alike in good works and in virtues; Khalîl, the Mâliki, son of Isḥaḳ, son of Yâ'ûb—may God forgive him his sins—says:—

Glory be to God: glory, equal to His innumerable benefactions: Thanksgiving I offer for the gifts, those virtues of the body and the soul, which have been granted me by His generosity and His munificence. Alas, that I cannot enumerate or properly describe the marvels of His dominion and His grandeur: for He alone knows them and can exalt them. We invoke all His goodness and the assistance of His grace in all the vicissitudes of this life, and for that moment when man descends into the grave. Benediction: Salvation be upon Muḥammad, the Lord of the Arabs and of the other peoples, the envoy of God to all nations: May God cover him with His favours: him, his family, his disciples, his wives, his posterity, his nation—the most noble among nations.

Now God has shewn to several persons, as also to me, the path of pure truth, and directs them and me in the ways of righteousness. Divers persons, with whom I have had speech, have asked me to compose a code of jurisprudence, as followed by the School instituted by Mâlik, son of Anas—May God's mercy rest upon him — a code which will embrace those fundamental principles upon which shall

[1] In Hausa form:—*Bismi Allahi errahmani errahimi, salla Allahu ala saydina Muhammadin wa alihi wa sahbihi wa salaman tasliman.*

This invocation forms the heading to all documents; letters are headed with the first part of the invocation only, which is of Jewish origin.

be based legal judgments and decisions in religious and civil affairs. After having sought, in prayer, the will of God and having invoked the assistance of His grace, I have agreed to comply with this request.

* * * * *

And now I will pray God to grant that usefulness and advantage may accrue to any one who may transcribe this book for himself or for others; to any one, who may further its teaching or who may read it as a study, or even as a recreation; to any one, who may possess it as a simple possession, or in order that he may learn from it; and to all who may make use of it with good intentions. And I pray God to preserve us from all errors and faults and to direct us in salutary fear, alike in our words and in our works.

Finally, I ask all men of intelligence and knowledge not to judge this book too censoriously, on account of those matters in which it may be lacking or imperfect. I ask, in supplication and humility, in submission and with respect, that this work may be regarded with goodwill and with active interest; that that which may seem to be obscure or inexact in diction or in style may be elucidated and explained, and that faults may be amended.[1]

For few writings are above reproach and few authors have written and not made mistakes.

[1] The sense indicated is:—that the obscure terms and passages may be modified or corrected by explanations or reflections, or changes in style, marginal notes, commentaries, observations, etc.; but not by changing or altering the original text. (Perron, I. p. 512.)

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PART I

CHAPTER I[1]

PURIFICATION

SECTION I

OF THE PURITY AND IMPURITY OF WATER RELATIVE TO PURIFICATION.[2]

SECTION II

PURE AND IMPURE BODIES AND SUBSTANCES: CLOTHING AND ORNAMENTS PERMITTED AND FORBIDDEN.

AMONG substances which must be considered as pure are:—the dead bodies of invertebrate animals, e.g., insects, flies, ants, locusts, scorpions, etc; the dead bodies of aquatic and marine animals, even of those which are amphibious, e.g. frogs, water turtles, crabs, crocodiles, etc; the dead bodies of animals which have been killed by the cutting of their throats, and all parts of the bodies of these, except animals the flesh of which is prohibited; camel hair, feathers, furs, hair (even the bristles of pigs, provided they have been cut, not torn out); solid bodies of inert character, which are not ejected from the interior of any living animal;—inert means not possessing vitality; thus the egg, although ejected from the body of a living creature, is not placed in the class of inert solids without life.

It is forbidden to pray when covered with the garment of the Infidel or of an individual who drinks wine; but this prohibition does not extend to clothing manufactured, or worked up, by an Infidel or an idolater—provided he has not been the active possessor thereof. Prayers must never be said when covered by a garment of any kind of material upon which another Muslim has slept, even though he be a man who is regular in his prayers, or when covered by a garment belonging to an individual who does not say his prayers; but one may

[1] All the chapters of Part I, i.e., Chapters I–VI, have been very much abbreviated.

[2] This section enters into minute detail touching the purity and impurity of water with reference to the usual Muhammadan purifications. The Arabic term for ceremonial purity is *Ṭahârah*.

pray having on the head the head-dress which one of the persons specified above may use, because this head-dress is not in contact with those parts of the body which may cause impurity.

All men from the age of puberty are forbidden the use of personal jewellery or adornment of either gold or silver [1]; it is even forbidden to intermingle gold or silver with the tissue of belts or sashes, nor can gold or silver be applied in ornamentation of arms or harness of war. By the last two terms are understood lances, daggers, shields, saddles, stirrups, spurs, bridles, or other head-dress of horses. Nevertheless, it is permitted to ornament with gold and with silver the cover or binding of a copy of the Korân ; but this does not apply to the writing within the holy book : for it is undesirable to introduce, in the copying of its text, letters or illuminations in gold or silver, or even letters in red colour. It is likewise permitted to adorn with gold and silver the hilt and scabbard of the sword ; because the sword is the first and noblest of arms. It is also permitted to make, in gold or silver, attachments for the teeth.

Finally seals, or seal rings [2] of silver are permitted, unless the silver contain gold, in however so small a quantity.

Women, as well as men, are forbidden to make use of gold or silver utensils and also to buy or employ such utensils, even though they may be disguised on the exterior ; and, likewise, to buy or to use vases or utensils (household ware) plated in gold or silver. But with regard to objects in the form of rings in silver or in gold, such as handles for the drawers of furniture, door knobs, etc ; as also vases ornamented with precious stones, such as emerald, crystal ; there are two sayings or opinions : jurists, in some cases permitting, in other cases, forbidding.

Women are permitted, without any restrictions, the use of ornaments of gold and silver for personal adornment ; even for the embellishment of their foot-gear. But neither gold nor silver is permitted, even to women, for the purpose of ornamenting beds, mirrors, combs, fans, or other toilet requisites.

SECTION III

OF THE OBLIGATION TO BE PURIFIED BEFORE PRAYER : ACCIDENTAL IMPURITY : NECESSITY FOR THE PURIFICATION OF CERTAIN OBJECTS UNDER CERTAIN CIRCUMSTANCES.

[1] cf., Korân, VII. 25. *Hidâyah* IV. 92.

[2] The rings generally used among men and particularly among the *Shaikhs* and *'Ulamâ'* are engraved with the name of the individual only, accompanied at times by a pious invocation. In the East no act, note, or order is ever signed in running hand, the seal is always made use of.

Khalîl here only intends to speak of seal rings or of seals, and then only of those made of silver. All other rings or jewellery in gold should be taken off the hands or arms before ablution or prayer. (Perron, I. p. 514.)

Section IV

Of Ablution. Details as to the methods, both as to those which are of Divine Obligation and of those which are prescribed by the *Sunnah*.[1]

Section V

Of details that are meritorious when carrying out Ablutions.

Section VI

Of the demands of Nature: precautions and necessary practices.

Section VII

Of circumstances which annul, or do not annul, the efficacy of ablution.

Section VIII

Of general washing or lavation of the exterior of the whole body, and of the circumstances which render it obligatory.[2]

Section IX

Of madefaction or *mashsh*[3]: it replaces, in part, ablution. Method. Circumstances which render *mashsh* of no avail.

Section X

Of pulveral purification, or *tayammum*.[4]

Section XI

Of the method of Purification in the case of illness or of wounds.

Section XII

Of menstruation.

[1] The details are most minute, but it is the *intention* that constitutes the character and value of the ritual. For a description of *wuḍû'*, or the ablution preparatory to prayer, see Lane, I. p. 85; or for a fuller account, Reland, De Rel. Moh. pp. 80–83; ed. 1717.

Purification has no power to cleanse the soul from sin. Sin can only be obliterated through mortification, repentance, sorrow, and tears of penitence. (Perron, I. p. 515.)

[2] The student is referred to Lane, I. p. 89. Reland, de Rel. Moh, pp. 66–77; ed. 1717.

[3] *Mashsh* is a concession in the matter of the ablution of the feet when boots are worn.

[4] Perron explains (I. p. 521) that pulveral purifications are so called, because they are practised only where there is a lack of water, with substances in a powdered condition, and principally with dry earth, upon which the hands are placed and afterwards carried once over the face, and over each hand and each arm up to the elbow. Pulveral purification was evidently contrived for people who, like the Arabs of the Arabian Peninsula, were exposed to the necessity of travelling in waterless deserts, where they could only obtain enough water to slake the thirst.

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CHAPTER II

PRAYER (*ṢALÂT*

SECTION I

OF CANONICAL HOURS FOR PRAYERS[2]: OF SUITABLE AND UNSUITABLE PLACES FOR PRAYING: OF CULPABILITY WITH REFERENCE TO THE OBLIGATION OF PRAYER.[3]

[1] The word *salât* is always rendered as *prayer*, though it would be more correctly rendered by the word *service*. In Islâm prayer is reduced to a mechanical act, as distinct from a mental act (*duʿâ*). *Ṣalât* must be said in Arabic. (Hughes.) *Duʿâ*, or *supplication*, may be said in any language.

[2] On his translation to Heaven, Muḥammad is said to have seen God face to face. God revealed to him His most ineffable mysteries, and ordered him to establish five daily prayers, i.e., in the twenty-four hours. These five prayers are therefore of divine precept and of absolute obligation. According to Muḥammad, the original institution of these prayers goes back to the five great prophets: Adam, Abraham, Jonah, Moses and Jesus. Adam, on leaving Paradise, found himself in darkness; at the approach of dawn he made two *rakâʿât* (prostrations) in thanks to God, who had given him the light. Abraham instituted the midday prayer after the angel had stayed the hand of the old patriarch when he was about to sacrifice Ishmael (because, according to the Arabs, it is Ishmael, their presumed ancestor, of whom God demanded the sacrifice). Abraham made four *rakâʿât* in thanks to God. Jonah instituted the afternoon prayer, which is called *salât al-ʿaṣr* in Arabic. He made four *rakâʿât* in thanks to God for having delivered him from his ignorance, from the depths of the sea, the darkness of the night, and the belly of the whale. The evening prayer, at sunset, owes its institution to Jesus, who made it of three *rakâʿât*. The motive alleged by Muslims for the institution of this prayer is significant enough. It was, they say, in acknowledgment of his dependence, and that of Mary, and as an act of adoration of God who at this hour spoke from above. Finally, the fifth prayer, or that of the night, was established by Moses. He made it of four *rakâʿât* to thank God for having delivered him from the perplexities and anxieties which surrounded him when, leaving the town of Medyen to return into Egypt, he found himself at the first hour of the night alone in the plain of Wadi-Eimen. (Perron, I. p. 525.)

[3] In this sub-section 'Culpability with reference to the obligation of prayer,' it is said by Khalîl that, if a Muslim refuses to make any one of the five prayers of Divine Obligation, he may be allowed to delay until there shall remain only sufficient time to accomplish a *rakâʿât* with the two prostrations which form part of it; and that, if the guilty one persists in his recalcitrancy, he shall be put to death by the sword in satisfaction of the explicit and precise will of the Law.

SECTION II

OF THE *ADHÂN* OR CALL TO PRAYER.[1] OF THE *MU'ADHDHIN*, OR OF THOSE WHO CALL TO PRAYER FROM THE MINARET OR THE MOSQUE OR IN PRIVATE DWELLINGS. OF THE *IḲÂMAH* OR PREPARATION FOR PRAYER.

SECTION III

OF FORCED OR INVOLUNTARY INTERRUPTION OF PRAYER[2]: OF CERTAIN PARTICULAR INSTANCES: AND, MORE PARTICULARLY, OF BLEEDING OF THE NOSE BEFORE—OR DURING—PRAYER.

SECTION IV

OF THE PARTS OF THE BODY TO BE COVERED OR HIDDEN, AND OF RAIMENT DURING PRAYER.

SECTION V

OF THE *KIBLA*[3] OR DIRECTION IN WHICH THE FAITHFUL SHOULD HAVE HIS FACE TURNED FOR PRAYER.

[1] The *adhân* is as follows:—
(1) God is most great! (repeated four times).
(2) I testify that there is no deity but God! (twice).
(3) I testify that Muḥammad is God's apostle! (twice).
(4) Come to prayer! (twice).
(5) Come to security! (twice).
(6) Prayer is better than sleep! (twice). (These words only occur in the morning call).
(7) God is most great! (twice).
(8) There is no deity but God! (once).

In Hausaland the *Ladan* runs thus:—
(1) *Allahu akbar*! (twice).
(2) *Ashahadu ala* (or *an la*) *illaha ila'llah*! (twice).
(3) *Ashahadu ana Muḥammadu rasulu'llah*! (twice).
(4) *Haiya ala 's-sala*! (twice).
(5) *Haiya ala ('l) fala*! (twice).
(6) *Assalatu hair min an-naumi*! (twice, in the *Assuba* call only).
(7) *Allahu akbar*! (twice).
(8) *La illaha ila 'llah*! (once).

Since the Muhammadan day begins at sunset, the first call is the *Ṣalât al-Maghrib*, just after sunset. In Hausaland the names of the *ladan* are as follows:—
1st. *Magariba*: sunset.
2nd. *Lisha* or *L'isha*: after the last gleam of sunset has disappeared.
3rd. *Assuba*: at the first gleam of dawn.
4th. *Azahar*: about 2 p.m.
5th. *La'assar*: between 4 and 5 p.m.

These Hausa forms correspond to the Arabic: *Maghrib*, *'Ashr*, *Fajr* or *Ṣubḥ*, *Ẓuhr*, *'Aṣr*.

[2] It is reckoned sinful to pass near before a person engaged in prayer. (Lane, I. p. 89.)

[3] In a mosque this direction or *ḳiblah* is marked by a niche (*miḥrâb*) in the wall pointing towards Mecca.

Section VI

Of the ritual of Prayer.[1]

Section VII

Of variations in the ritual which are permitted on account of weakness or of sickness or of other causes. Of signs and gestures which may, in certain cases, be substituted for the ritual.

Section VIII

Of reparative Prayer.[2]

Section IX

Of penitential practices on account of mistakes made during prayer. Circumstances which annul Prayer, wholly or in part. Omissions in prayer recited in common.[3]

Section X

Of prostrations during the reading or recital of the eleven passages of the Korân.[4] Of prostrations which are blamed by the Law.

Section XI

Of supererogatory Prayers.[5]

Section XII.

Of Congregational Prayer.[6]

Section XIII

Of the changing of the imâm during Prayer.

[1] Though the ritual appears to be long and intricate, prayers of four *rakâ'ât* can be got through in from three to four minutes.

[2] Refers only to the rules to be observed in the event of the Imâm, or worshipper, having unintentionally abrogated or changed the order of the ritual.

[3] The previous note applies.

[4] There are eleven passages in the Korân after which a prostration is made. Ejaculations are also made in several places. See Perron, I. p. 534; Hughes, p. 517.

[5] For the detail of ritual and the meaning of prayer the student is referred to Sachau's *Muhammedanisches Recht*; Sell's *Faith of Islam*; Burton's *Pilgrimage*; article 'Prayer' in Hughes; and Lane's *Modern Egyptians*.

[6] To attend congregational prayer on Friday is of canonical obligation. Friday was fixed upon as the Muhammadan sabbath principally because, as it is said, Adam was created on that day and died also on that day. It is also said that the general resurrection will take place on Friday; whence particularly, Friday was named the day *al-Jum'a*, or the assembly. (Lane, I. p. 100.)

The value of congregational prayer lies in the fact that it is a witness to the faith and a source of edification to others. (Perron, I. p. 198.)

Section XIV

Of Obligatory Prayer when travelling.

Section XV

Of the Ceremonial of Friday Prayer.[1]

THE Friday office should be performed in the oldest Mosque of the locality under the leadership of the Imâm.[2] At least twelve notables of the locality should be present and they should remain till after the final blessing.[3] No passing or stranger Imâm may conduct the office. It is the presiding Imâm who delivers the sermons and two sermons are required by the Law.[4] It is blameable to abstain from work on Fridays in imitation of Christians and Jews. The Law further blames the attendance of women at Friday prayers, unless they be past the canonical age. A traveller may set out on his journey before sunrise on Friday, but not later in the morning.

Section XVI

Of Prayer when in fear—i.e. when there is real or probable reason for fear: either in battle, or in the presence of the enemy, of in the enemy's country.

Section XVII

Of the Office on the two great annual festivals.[5]

Section XVIII

Of Prayer on the occasion of Eclipses.[6]

[1] Tradition says that Muḥammad ordained Friday as 'the day of Assembly' by Divine Command. (Hughes.) See also Sale's Koran, LXII. note ix; also p. 23, note 6.

[2] Hausa, *Limam*. The Imâm enjoy no authority above other persons, nor are they a distinct order of men set apart for religious offices (Lane, I. p. 103.)

[3] Amongst those of the Shâfi'i school, there must be at least forty with the Imâm. (Perron, I. p. 251.)

[4] The first is a sermon and the second a set exhortation and prayer, *khuṭbat al-na't*, in which occurs the prayer for the Sultan or the Government. For specimens of these Sermons, see Lane, I. pp. 107–112.

[5] The two great Muslim festivals are: (*a*) the minor festival, *'Îd al-Fiṭr*, the breaking of the fast; known in Turkey as *Ramazan Bairam* and in Hausaland as the *Karamin Salla*; (*b*) the *'Îd al-Aḍḥâ*, the greater festival, or *'Îd al-Kabîr*, the feast of the immolation; known in Turkey as *Kurban Bairam* and in Hausaland as the *Boban Salla*. The minor festival begins on the first day of *Shawwâl*, the next month to *Ramadhân*, and lasts for three days; the greater festival begins on the tenth of the month *Dhu-l-ḥijjah*, and lasts three or four days.

For the month of fasting or *Ramadhân*, in Hausa *watan azumi*, see p. 55.

The only other festival generally observed in Hausaland is that of *Muḥarram*, commonly known as *sallan shigga chikki*, the festival of the full belly.

[6] Perron says of this, in his Notes, that the prayer on these occasions was instituted by the Prophet. When Ibrâhîm, son of Muḥammad, died, there took place an eclipse of the sun, and by this coincidence the people appeared to be

SECTION XIX

OF SPECIAL PRAYERS IN TIME OF DROUGHT.

SECTION XX.

OF FUNERAL PRACTICES AND FUNERAL CEREMONIES AND SERVICES: TOMBS, INHUMATIONS AND EXHUMATIONS.[1]

Sub-section 1. Of the washing of the dead.

Sub-section 2. Of prayers for the dead.

Sub-section 3. Of burial expenses.

The Believer shall be buried in garments such as he ordinarily used for the solemn prayer of Friday; that is if the heirs or the circumstances prevent the procuring of other burial clothes. The expenses of burial are the first charge upon whatever estate the deceased may have left.

For the unfortunate with no resources, funeral expenses are to be paid by the Public Treasury; or in default, then at the expense of the Muhammadan Community.

Sub-section 4. Of the last assistance to be given in the death agony, and immediately after death.

Sub-section 5. Of the washing of the corpse.

Sub-section 6. Of grave cloths or shrouds.

Sub-section 7. Of funeral convoys and burials.

The religious convention is that followers should be on foot at the funeral service and at the cemetery. It is permissible to return mounted: in imitation of the Prophet David, who in going to funerals, refused to be mounted, but when returning, used his horse. The convoy should not be led at too slow a pace, the mourners should walk in front of the bier; if not on foot they should remain at the end of the convoy; the procession should be closed by the women. The bier of a woman should be covered by a rounded structure.

The tumulus should not be raised more than one hand above the trench, and should be modelled after the shape of a camel's back. But doctors of the Law have condemned this arrangement, and have

stupefied. Muḥammad then said: 'I declare to you that the sun and the moon are two wonders of the Almighty: they do not eclipse, either for the death or for the birth of any person. When you perceive these phenomena refrain from whatever you may be doing and pray.' This prayer, which Khalîl describes in this section, was instituted to reassure those who were inspired with terror upon the appearance of eclipses, and to discredit the superstitious ideas of the people and the extravagant and ridiculous explanations of astrologers. The prayer on the occasion of an eclipse of the moon is not obligatory if such an event occurs about sunrise or sunset. To-day, prayers on the occasion of the eclipses have fallen into desuetude. (Perron, I. p. 551.)

[1] For a description of funeral ceremonies, see Lane, II. p. 251, *et sq.*

recommended that the ground surface be left flat and without elevation. The mourner who finds himself next to the grave should throw therein handfuls of earth; a repast should be prepared for those who accompany the convoy; and it should be a duty to go to the nearest relatives of the deceased, and pay a visit of condolence, and offer them religious consolation.

Too much depth should not be given either to graves or tombs; the limit is that of a cubit. The corpse should be placed in the sepulchre lying upon the right side, and with the face turned in the direction of the *ḳiblah*. If there be no fear that the body has already begun to putrefy, anything in the funeral which may have been done contrary to established principles—e.g. the fact that the grave has not been filled up to the surface, or that the feet of the deceased have been placed in the wrong direction in the grave or tomb, or that the usual lavations or ablutions have not been carried out, or that an individual converted to Islâm has been buried in the cemetery of the Infidels—should be corrected in conformity with the rule.

The opening left in the tomb should be closed with raw brick, or in default of this description of brick, with planks; or in default of either, with tiles of semi-cyclindrical shape; or in default of these, with burnt brick. If all these kinds of material be unobtainable, it is preferable to use stones, or the stalks of graminaceous plants, such as maize. Finally, in the absence of all these, the grave should be filled in with earth. All these methods of procedure are preferable to the use of coffins.

Sub-section 8. Of acts permitted and forbidden, relative to ablutions, burial clothing, funeral convoys, manifestations of sorrow, changing of sepulchre.

Sub-section 9. Of burials and funeral services during epidemics.

When there is necessity—e.g. when grave diggers or funeral furniture are unobtainable, as during epidemics, it is preferable, without contravening the law, to bury several dead in the same grave.

When several corpses are placed in the same grave, the corpse of the individual who enjoyed the highest consideration should be given the first place: that is, on the side facing Mecca. Thus, the following should be the order of precedence in a family: the grown man, the young man, the boy, the woman. When there are several dead, for whom the same prayer is to be said, the order of precedence should be :—immediately after the Imâm, the freeman, (and here there is a categorical order of precedence, as follows :— science, social rank, age) ; freeborn children who should be placed in the order of their knowledge of religion, their piety, their docility, and their intellectual attainments, (but a considerable difference in age usually decides the first rank ;) male slaves, who are placed in order

of age, followed by merit, knowledge of religion and moral qualities; and, lastly, eunuchs, followed by hermaphrodites—each in the same relative order as the other dead.

(It is to be remarked that Khalîl did not fix a place for women. But, according to Ibn-Muḥarriz, who enumerates twenty different degrees in the above series, women come last).

The bodies of the various classes may be ranged in separate rows.

It is perfectly permissible to visit burial places; no limitations are placed upon such acts of remembrance.

Sub-section 10. Of blameable practices and acts relative to lavations after death; prayers for the dead; burials; and funeral convoys.

It is reprehensible to recite a chapter of the Korân beside a dying man; to burn aromatic substances in the sick-room or the house; to recite the Korân, either beside the body of the Believer who has departed life, or at his burial; to ejaculate or raise cries in following the convoy; to repeat to the assistants: 'Oh, ask God to have mercy upon this unfortunate creature'; to leave the convoy before the prayer, or to leave it without permission. It is blameable to introduce the bier into the interior of the mosque, and there to pray for the dead.

The Law blames him, who, whilst in a state of impurity, washes the dead. The Law does not approve of a still-born child being washed, nor of its being buried with perfumes or aromatics, nor of a name being given to it, nor of the burial of the corpse in the house. If such a child be buried in the house, such a burial shall not constitute a circumstance which prevents the sale of such a house. Ordinarily the place wherein the dead are buried is, in the eyes of the Law, a species of *ḥabs*, or non-conveyable property, which cannot be either sold or alienated and in which, consequently, there can be no real property. It is contrary to the spirit of the Law to bury the dead in silks, or in impure shrouds or garments; or in shrouds or garments of green, or of blue, or of black, or of the colour of carthamine, whenever it is possible to procure materials of the approved colour as sanctioned by religious convention.

It is blameworthy: to allow gatherings of women for the purpose of wailing, even if the demonstration be not loud; to carry the corpse on a bier of unusual dimensions; to place silken stuffs upon the bier; to follow the convoy, carrying lights; to announce and make known, in a high tone of voice, in the mosque or at the door thereof, the name of the dead. But the Law expresses no disapproval of the sending out of invitations, in the form of private communications between the Faithful.

The Law does not point to the necessity of standing when a convoy is passing.

The Law does not approve of the tumulus of earth being covered with mortar; or of the tumulus or tomb being whitened with lime or

with plaster ; of the slightest structure being placed upon the grave ; or of an isolating wall or fence being built around it. Tombs thus made apparent and of a monumental character are strictly forbidden. Nevertheless, it is permitted, as an indication of and means of expressing gratitude, to place a tombstone, or erect a piece of wood over a grave, but this monument must bear no writing indicating the name, the qualities, or the date of death of the deceased, or any other device whatever.

Sub-section 11. Of funeral ceremonies for martyrs.[1]

Sub-section 12. Of circumstances which exclude the necessity for washing the dead. Of lavation and prayers for dead Muslims whose bodies are inextricably mixed up with those of non-Muslims. Prohibition of prayer for the dead when the body is not present.

Sub-section 13. Of the Imâm and prayers for the dead.

Sub-section 14. Of the inviolability of graveyards.[2] Of disturbing graves. Of exhumations. Of depth of grave.

The place of burial of the dead becomes, *ipso facto*, non-conveyable ground. From the moment a corpse has been deposited in the grave, it is impossible to devote the ground to any other use whatever ; the ground becomes sacred, inviolable, and, as the commentator says, it is neutralized, and no one can possess the right of allocating it for any purpose, other than that of burial. It is censurable to walk upon, or pass over, a grave or tomb.

It is forbidden to open graves, so long as there remain any debris or bones of the dead. But it is permissible to open and search a tomb, in the following cases :—(*a*) where the cloths, which have been used to shroud the body, were taken or retained by force or injustice, and where those cloths have been reclaimed, with proof of the injustice or violence to which it was necessary to submit, by the person to whom they really belong ; (*b*) where the burial has taken place upon the property of any individual without his direct consent and where the proprietor reclaims his property ; and (*c*) where articles of value have been forgotten at the time of burial.[3] When a grave has been

[1] Muslims denote as martyrs all those who die with arms in their hands or exposed to the risks and perils of Holy War, i.e., war against Infidels or against schismatics ; either in conquest, defence, or resistance, or in expeditions for plunder. Even he who is killed in his sleep under such circumstances is martyred. Moreover, all Muslims killed by Infidels, under whatever circumstances, are martyred. (Perron, I. p. 556.)

[2] The custom of burying the dead under the floor of the house is certainly contrary to the spirit of the Law. It is probably an idea of pagan origin that has survived in some parts of Hausaland.

[3] The explanations of commentators is given with some detail in order to provide as much material as possible for the discussion of questions which

dug in ground set apart for public burial, and another corpse, that of a person other than he for whom the grave has been prepared, has been buried therein, the body shall not be removed; but the cost shall stand as a charge against the heirs.

The maximum depth to be given to graves and tombs for the dead should be such as just to suffice for the prevention of the escape of emanations; and for the preservation of the body from the veracity of wild beasts, wolves, hyenas, lions, etc.

Sub-section 15. Of autopsy. Of women who die enceinte. Of the use of human flesh.

On the simple deposition under oath of a witness, permission may be given to open a body in order to extract a precious object.

A woman who has died enceinte shall not have her body opened in order to extract the child. Notwithstanding this, there are authorities of high standing who assure us that such an operation is permissible, provided there is reason to believe that the child is viable.

The most highly respected authorities forbid the use of human flesh under all circumstances. Nevertheless, some jurists have permitted it, and with reason, in case of absolute necessity.

Sub-section 16. Of deaths at sea. Of deaths in the house of an Infidel. Of obligations due on the death of non-Muslim parents. Of the two essential conditions which render the prayer for the dead most efficacious to the deceased.

The body of the Believer who dies at sea shall be thrown into the waves after having been shrouded; but the body shall not be cast into the sea unless there be no hope of making a landfall before decomposition sets in.

An Infidel, even though he be a near relation of the dead, may not fulfil the last duties. A Muslim may not even follow an Infidel to the grave; he will not help to lower him into the grave unless there is reason to suppose that the corpse might be left unburied.

may arise concerning sanitation, burials, exhumations, etc. Muslims have an extraordinary repugnance to troubling the peace of the dead, even under the gravest circumstances, and even when the Law may have need of verifying by exhumation the causes which led to the death of individuals. (Perron, I. p. 557.)

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CHAPTER III

ZAKÂT[1]

SECTION I

OF THE ASSESSMENT OF CATTLE.[2]

Sub-section 1. General directions.

THE Law ordains, as a canonical obligation, the payment of *zakât* [3] upon certain fixed numbers of live stock held in full property

[1] The obligatory alms termed *zakât* must not be confounded with the land tax (*kharâj*; Hausa, *kurdin kassa*) or the capitation tax (*jiz'yah*; Hausa, *gandu*), see pp. 82, 83. When *zakât* is assessed upon the fruits of the earth it is termed *'ushr*, and in this case it corresponds to tithes. The whole subject of taxation and land tenure is exhaustively treated in the standard work on the subject relating to the Mâliki School: *Recherches sur la Constitution Territoriale dans les pays Mussulmans*, by Worms, 1846. The work is now unobtainable, but a typed copy may be consulted in the Kano Library.

[2] Hausa, *jangali*.

[3] Alms, *zakât*, from the Muslim point of view, are expiatory donations rigidly ordained by religion and fixed in proportions relative to the nature and quantity of the property.

Zakât, prayer, fast and pilgrimage constitute the four great fundamental obligations of Islam.

'Under the word *zakât*, says M. Worms[a] in his interesting work concerning the constitution of property in Muslim countries, particularly in Algeria, Muhammadan Law enjoins assessments which have both the character of alms and of taxes, in that, while it leaves to the discretion and good faith of a Muslim the declaration and distribution of that which is assessed upon property known only to himself, it prescribes the official collection of the assessments upon his known wealth through special agents appointed by the sovereign, and finally fixes irrevocably both the figure and nature of these assessments.'

'This *zakât*, which is intended to purify in the eyes of God the possessions upon which it is assessed, constitutes the first tax known in Islâm. Muḥammad instituted it for the upkeep of his first partisans. During the first years of Islamism, the *zakât* formed the basis of the Muhammadan public treasury and finally became the charitable fund of Islâm'. *Zakât*, according to the *Hidâyah*, is an ordinance of God, obligatory upon all free individuals sound in mind and body, adult and Muslim, who are fully possessed of the quantity of worldly goods or effects amounting to the value indicated in the language of the Law by the term *niṣâb*, provided always that they have been in possession for the space of a complete year. Generally speaking the *niṣâb* is fixed at a value of 200 *dirham*, which is equivalent to about £5[b]. The assessments may be applied in part to certain requirements of the State. It was from these assessments that 'Abd-al-Kâdir found the money necessary to oppose the advance of the French in Algeria. (Perron, I. p. 558.)

[a] pp. 64, 65 of the typed copy in the Kano Library.

[b] See p. 44, note 2.

during a complete year.[1] Live stock includes animals out to grass, draft or pack oxen, and the increase of such animals.

For each class of animals a minimum assessable number is fixed by Law.[2] If this *niṣâb* number, which has remained in the owner's possession for a full year, be added to, even one day before the expiration of the year, the total number then becomes assessable.

But if the number, before the recent additions, did not reach the *niṣâb*, then the total, after the additions have been made, is not assessable, unless the additions were the natural increase of the herd. Through natural increase the owner obtains profit on his capital ; by acquisition he increases his capital.[3]

Sub-section 2. Of assessment upon camels.

For every five camels, which is the *niṣâb* or legal assessable number above which the Law exacts payment, the tax is one ram or a sheep two years old if the greater part of the flocks of the country be not in goats. If goats be more numerous in the particular locality, the tax is one goat ; even though the owner himself may possess no goats. If the owner have neither goats nor sheep he must procure some from the nearest locality.

Up to the number of twenty-five camels, the tax is one ram and one sheep for every five camels ; one ram and one sheep for five to nine camels ; two rams or two sheep for ten to fourteen camels ; three for fifteen camels up to nineteen ; and four for twenty up to twenty-four. For twenty-five camels, the tax is one she-camel one year old : a camel without fault or blemish, and exclusively the property of the owner. If the owner have no she-camel of this age, or none which is exempt from faults or blemishes, or none possessed in full ownership, he must give a two-year-old camel ; and, if he has not a camel of two years of age, he must procure a yearling she-camel. The one ought not to be replaced by the other, except in cases of absolute necessity and as here indicated by the Law. Between the numbers twenty-five and thirty-five, the tax does not increase ; but when the number is thirty-six, the assessment becomes one two-year-old she-camel. On forty-six camels the assessment is one three-year-old she-camel ; it may not be a four year old, nor a two year old. From thirty-six to forty-five camels, the assessment does not change ; and the same principle applies, from forty-six to sixty.

At sixty-one and up to seventy-five, the assessment is one she-camel of four full years of age.

[1] The complete year during which property must be held to be assessable is termed *haul al-haul*. (Hughes.)

[2] The fixed amount of property upon which *zakât* is due is termed *niṣâb*. The property must be all of one kind.

[3] The theory being that income alone is taxed. For full explanation see Houdas, pp. 148, 149.

At seventy-six and up to ninety, the assessment is two two-year-old she-camels.

At ninety-one and up to one hundred and twenty, the assessment is two three-year-old she-camels.

At one hundred and twenty-one and up to one hundred and twenty-nine, the assessment is left to the decision of the collector ; and may be either two three-year-old she-camels or three two-year-old she-camels.

Beyond the figure one hundred and twenty-nine, for every additional ten camels, there will be an increase in the assessment : the basis of which is changed. Thus, each forty, which goes to make up the total, is taxed one two-year-old she-camel ; and each fifty which goes to make up the total is taxed one three-year-old she-camel.

In practice, the principle is applied as follows :—for example, on one hundred and thirty camels, the assessment is one three-year-old and two two-year olds :—

Assessment on	130 :	1	three-year-old	and	2 two-year-olds.
,,	140 :	2	,,	,,	1 one-year-old.
,,	150 :	3	,,		
,,	160 :				4 one-year-olds.
,,	170 :	1	,,	,,	3 ,,
,,	180 :	2	,,	,,	2 ,,
,,	190 :	3	,,	,,	1 ,,
,,	200 :	4	,,	or	5 ,,

For the last figure of two hundred, the assessment is either four three-year-olds or five two-year-olds, according to the decision of the collector.

Sub-section 3. Of assessments upon horned cattle : bulls, cows and buffaloes.[1]

For the minimum assessable number of thirty bulls—i.e. bulls, cows and buffaloes—the assessment is fixed at one two-year-old calf or heifer.

For every forty head of cattle, the assessment is one three-year-old cow. The tax remains the same up to fifty-nine ; but from sixty to sixty-nine it becomes two two-year-olds. Beyond sixty-nine, an assessment is arrived at based on each round number of thirty, or on each round number of forty, which may go to make up the total number of the herd : each round number of thirty being assessed at one two-year-old, and each round number of forty at one three-year-old. It is the same method of calculation as that adopted in the case of camels for the numbers forty and fifty respectively. According to this method, the collector may select, at his own choice, the basis of computation, up to one hundred and twenty.

[1] This is the *jangali* of Hausaland.

For the number of one hundred and twenty-five head of cattle, the assessment is based on the method of computation followed in the case of two hundred camels—i.e., for one hundred and twenty head of cattle the assessment is three three-year-olds or four two-year-olds.

Sub-section 4. Of the assessment of sheep and goats.

On a flock of forty the assessment is a yearling ram or sheep, or a goat of the same age. On one hundred and twenty-one and up to two hundred, the assessment is two sheep. On two hundred and one and up to three hundred and ninety-nine, the tax is three sheep. On four hundred the tax is four sheep; and beyond the number four hundred, the assessment is one sheep per cent.

Sub-section 5. Method of procedure in assessments where flocks and herds vary in composition.

The owner is bound to deliver to the collector animals of average size and condition whatever may be the species of animals: camels, calves or cows or bulls, buffaloes, sheep or rams or goats; and he must do this even though all the herds possessed by him may be of poor quality, unless the collector himself consents to accept defective or indifferent animals. The collector may not, however, accept animals under the age laid down by the Law.

When the number in one class of animal is below the *niṣâb*, the number may be made up by adding together kindred kinds or species: Arab camels with the dromedaries of Khorassan, bulls and cows with buffaloes, goats with sheep. In such an event (i.e., adding together different species or varieties in order to obtain the minimum assessable number), if the two kinds be equal in number when making up the *niṣâb*; e.g. twenty sheep and twenty goats, or fifteen bulls or fifteen buffaloes; the collector may take from either variety the animal which is due upon the supposition that the assessment amounts to one animal only. When the two kinds are unequal in number; when, for example, to make up the remainder of the number for assessment to twenty camels, or twenty buffaloes, or forty sheep, there is added respectively ten dromedaries or ten bulls or ten goats; the collector must make his choice from the more numerous variety. Thus in the three instances now cited, the taxes taken will be a yearling camel for the twenty camels, a yearling buffalo for the twenty buffaloes, and a sheep or ram for the forty sheep: the additional ten head which have in each case been taken merely to make up the number not being otherwise considered.

When the assessment amounts to two animals, one is taken from each of the two classes if they be equal in number; if unequal, then the two animals required by the Law are taken from the larger of the

two. When the tax amounts to three animals and the two numbers which go to make up the assessable total are equal, say one hundred and one sheep, and one hundred and one goats, one animal is taken from each of the two quantities ; the third being selected from either, at the discretion of the collector. When the tax is one of four animals or more, it is based upon the number of hundreds.

Sub-section 6. Assessments in cases of exchanges, sales, and purchases of cattle.

The owner who has possessed for the legal period a herd of assessable number and who, wishing to avoid payment of the tax, exchanges in whole or in part his cattle for other cattle of the same species or of different species, better or worse, more numerous or less numerous, or who effects a sale in order that he may be able to say to the collector : 'I have not been in possession of this number of cattle for a complete year ;' or 'I no longer have any cattle' : such an owner must pay the tax prescribed by the Law, and that on the original number of cattle he possessed, not on that of the cattle he has had in exchange. This rule has the force of Law, even if the exchange, or sale, took place but a short time before the end of the year of possession. When the owner sells, i.e. exchanges against merchandise or money value, a herd which has been with him for six months, and, after the transaction, this herd has remained with its purchaser for a certain time ; if the herd return into the possession of the seller, either on account of fault or blemish in the animals sold or by reason of the failure or insolvency of the purchaser, this time is reckoned against the seller. That is to say : the assessment is carried out on the basis of the herd never having been sold by, or even having left the hands of its first owner. Nevertheless, no taxes will be levied from the owner if the purchaser, during the time that he has held the herd, has remitted the tax to the collector. The same method will be adopted in dealing with an owner who, having purchased animals intended for trade and not amounting to the *niṣâb*, exchanges them against gold or silver or against an assessable amount of an analogous species. The same rule will hold good even when the assessable values or animals, received by the owner, be replacements of animals which have died when in the hands of another individual ; or when an owner of animals kept for his own private use and needs, the same being of an assessable number, has exchanged them against value or against animals of a similar species ; whether of a number subject to assessment or otherwise.

But this method of computation does not apply, if the exchange of animals, purchased either for trade or for private or domestic use, has been made against animals of another species ; or if the owner of animals, previously sold by him, becomes possessed of the same animals by repudiation of the transaction by the purchaser ; or if an individual

exchanges a sum of money of assessable amount against cattle of an equally assessable number.

Sub-section 7. Of assessments upon herds or flocks, held in joint ownership or in partnership; of the subdivision of the tax between the partners.

When owners pool their stock and enter into partnership in the resulting herd or flock, they are regarded by the Law as one single individual so far as the tax is concerned. Touching the number of animals to be furnished for assessment, the provision of animals of the decreed age, and the species of animal to be given, such a partnership is considered to be a single individual, if the six following conditions have been fulfilled :—

(1) That the co-proprietor had, before everything, the intention of creating a partnership.
(2) That the individual partners are Muslims.
(3) That the individual partners are freemen.
(4) That each partner possesses a herd which, by reason of its number, is subject to assessment.
(5) That each has been sole proprietor of a herd of assessable number, for a complete year.
(6) That each of the partners, (and here Khalîl supposes two partners, for what applies to two would equally apply to many), puts his herd into partnership with the intention of constituting compact property, or to assure to himself certain advantages, five in number, which are here detailed and which the partners are supposed to share like mutually trusting brothers, to wit :—(*a*) shelters for herds against the heat of the sun ; (*b*) watering of the animals ; (*c*) folds or other enclosures for the herds ; (*d*) the care of the herds whilst grazing ; and (*e*) facilities for carrying out stud arrangements.

The total amount of the tax must be subdivided among the partners proportionally to the numbers held by each ; even though one of the partners may have, in the common holding, a number of animals intermediate between the assessable quantities. The subdivisions are determined by the value of what has been returned for assessment.

The subdivision must also be made proportional between partners when, the portion of each being equal but below the *niṣâb*, the collector or assessor, wrongly interpreting the law of assessment in its principle, collects the tax upon the total number of a herd which, but for the sole accident of the partnership, would not afford an assessable figure. Such a herd is not assessable, according to the law of partnership, because each partner does not possess a herd of assessable number.

The subdivision must likewise be made proportional when the common holding, while exceeding the number subject to assessment, is

owned in unequal proportion by the partners, and when the collector, while remitting the tax for a certain non-assessable number, still assesses a surplus which is only a consequence of the association or co-ordination of the herds, and not a figure primarily taxable. For example, let the case be taken of two owners in partnership, one having a hundred sheep and the other having twenty-five. In this case, if the collector, wrongly applying the Law, assesses the whole holding at two sheep and two rams, this will mean an excess of one animal; because he who owns twenty-five sheep cannot be assessed at all, while he who owns a hundred can only be assessed at one. It follows, therefore, that if the collector believed it to be his right to take two sheep, he would have to divide the tax proportionately between the two partners, taking from the one four-fifths, and from the other one-fifth of two sheep.

The subdivisions of the assessment indicated above are only lawful when the collector has assessed the tax in the belief that he was acting according to the Law; not when he, prompted thereto by ignorant brutality, has levied a grievous impost. In the last hypothesis, the individual from whom the collector has taken more than is legally due, must bear it as a personal loss which cannot be shared by the other partners. There is also no subdivision of an assessment illegally imposed upon a herd held in common, when the number of individuals in the partnership do not together hold an assessable quantity of stock: e.g., if, upon a flock of twenty sheep belonging equally to two partners, an assessment has been made and taken from one partner; he alone must bear the loss.

If an owner of eighty of the smaller domestic animals places them in partnership with two halves of the same number belonging to two separate individuals; i.e., if he place them in partnership with another eighty belonging, in halves, to two separate individuals not already in partnership with him; or if this owner of the eighty only place one half of them in common with forty others which are the property of another single individual; the procedure is as follows:—In the first case, the Law only considers the owner of the eighty to be partner in a single association; and the assessment upon him is one sheep, and that upon the other two, one half of a sheep each. In the second case, the assessment being one sheep, two-thirds are due from the owner of the eighty; the remaining third, from the owner of the forty. In these circumstances of fractional assessments to be borne by partners, each must pay to the collector his proportional moiety of the tax, according to the estimated value of his share.

Sub-section 8. Of the period of the year in which annual assessments upon herds shall be made. Of circumstances which may modify the duties of collectors or official assessors.

The rule is, that collectors go out to calculate the assessment upon herds, even in years of drought or of famine, at the exact period when the Pleiades arise at dawn.[1] This fixed time is of canonical obligation for the payment of these taxes, on condition, be it well understood, that qualified collectors be nominated and that they arrive at this fixed period in the localities which they are told off to assess. If the collectors arrive after the fixed period of the year, they may only assess the actual numbers which they may find. Even though the owners may have slaughtered or lost some of their animals, the tax can only be levied on the numbers actually present at the time of the collector's arrival.

An heir who inherits stock from an owner of herds, the same owner having died after the year of accomplished possession, but before the advent of the collector to levy the tax, begins the year of enjoyment with reference to future assessment from the day on which he may have inherited; on the condition, however, that he, the said heir, be not already possessed of herds of assessable number. If he already possess a herd of a taxable number, the inheritance is added to his old herd, and the whole becomes subject to assessment.[2]

It is not right to carry out at once the wishes of a deceased person who may have desired to dispose of part of a herd, e.g. in alms, or for specified good works[3]; such wishes of the deceased must not be carried out until after the liquidation of the legal assessment.

It is contrary to the spirit of the Law, and it is committing an

[1] The time of the year at which the assessments upon herds and cattle are to be made has been determined according to the lunar year as enjoined by the Korân. In a period of thirty-one to thirty-three years, all the months of the lunar year have passed through the different seasons. As it was necessary to collect the tax upon herds before the Arabs went in search of fresh pasturage, i.e., before the great heats of midsummer, the time for these assessments was fixed at the period when the constellation of the Pleiades rises at daybreak, which takes place in the first days of summer. The Law forbids the collection of taxes before this time out of consideration for the owners of herds and in order to allow the young animals to complete their full year, because below the age of one year animals should not be taxed.[a] In addition to these reasons, it is at this season of the year that the poor have the greatest need of assistance.

The Pleiades, according to Arabic commentators of Northern Africa, arise at daybreak upon the 27th of *Beshens*,[b] or in the middle of the Greek month *Yar*. The Law orders that the departure of the tax collectors should take place annually at the time the Pleiades rise at dawn, because the appearance of this constellation varies during the course of the year. According to seasons, it rises at sunset, or about eight o'clock, or in the middle of the night, and it is only at the beginning of summer that it rises at dawn. It is invisible at night for one month of the year only, during which it traverses in the daytime the visible portion of the sky. (Perron, I. p. 560.)

[2] Cf., sub-section i, p. 32.

[3] That is, by testament. A Muslim has power to dispose of one-third of his property only.

[a] Though apparently they should be counted; cf., sub-section i, p. 32.

[b] This Coptic month begins on May 8. (Lane, I, p. 277.)

illegal act which the Law may compel the actor to undo, to hypothecate or earmark, before the coming of the collector, the tax assessable on herds; and more particularly to dispose of these taxes on behalf of the poor.

If the herd at the time of the collector's inspection be below the number assessable, and if, later, after the departure of the collector, this herd increases through exchange or natural increase, so that at the collector's next return it has reached the *niṣâb*, the owner does not yet become liable to assessment; he having only entered on his first year of enjoyment, which year shall not be counted until it has been fully completed at the legal time for the collector's return. In other words, the tax can only be imposed, even upon a herd or flock of the minimum assessable number, if the owner has had full enjoyment of this herd for an entire year before the coming of the collector.

If the collector officially appointed for the levying of *zakât* delays and allows several years to pass without making any collection of taxes, and if the owner himself, in the meanwhile, gives to the poor animals really due to the official collector, the owner has no further obligation towards the Law. This legal decision is laid down by al-Lakhmi.

But when the owner has neither done away with nor disposed of any part of his herd, during such time as a collector may not have visited it, the assessment is to be made by going back to the time of the last visit of the collector, and is to be determined according to the increase or decrease after the next year—i.e., the year following the last assessment. Thus, supposing the collector, by reason of disturbance, war, etc., had not levied the tax for four years, and that, on the last occasion he had found five camels with a certain owner, and that on his return after four years he had found twenty camels, he would impose a tax of sixteen rams, sheep or goats, whether he was aware or not of the increase for each particular year. He takes thus four sheep for each year, as if the herd had numbered twenty during four years. But if, on the other hand, at the time of the last collection, the camels had been found to be twenty in number, and if, after an absence of four years on the part of the collector, there remained only five camels, the tax would only amount to four rams, sheep or goats, as if (whatever the cause of the decrease) the herd had numbered five, for four years.

Care must be taken to modify the assessment of the tax when its exaction in full would lower the number of the herd below the minimum assessible figure, or lowers its quality,—i.e. the age and value of the animals required by the Law, as taxes upon the various assessable numbers. Thus, supposing that the collector had not levied any taxes for four years and that the herd, which at the date of the last assessment had been of one hundred sheep, was now only to amount to forty-two. If the herd was assessed according to the above general prin-

ciples, at one sheep for each of the four years which had expired, the herd would be reduced to thirty-eight. Now the Law does not permit any assessment upon a flock of sheep under forty in number. Therefore, in the case here supposed, as soon as three sheep had been taken, the herd would number less than the assessable minimum and the collector could take no more ; he would thus lose the tax for one year, or one sheep. It is of equal importance to be very careful to ascertain the exact period at which the numbers in a herd became complete, by exchanges or by natural increase, and thus amounted to the assessable figure, which the herd did not possess at the date of the last assessment ; and for this purpose the declaration of the owner must receive credence. For example, if a flock which only contained thirty sheep (i.e. was not assessable) at the last coming of the collector, has reached the assessable number (i.e. forty or fifty) during the three years in which a collector has not appeared, it must only be assessed on two years, if upon a simple declaration (an oath is not necessary) of the owner it appears that the flock only attained its full number two years before.

No allowance, however, is made in the case of a decrease in the herd when the owner has disappeared with a flock of an assessable number and has thus eluded payment of his tax for one or more years. When such an individual returns, or when it is possible to recover from him, all arrears must be calculated upon the number of animals with which he disappeared, except for the last year or year of his return. Thus if an individual has disappeared for five years, having taken with him three hundred sheep, and on his return only forty are left him, he is assessed at twelve sheep, or one in one hundred, according to the Law, for the first four years of evasion, and at one sheep for the last year when the total number is only forty. No explanation can be accepted for the period of evasion. Moreover, if the owner who has disappeared with three hundred sheep, return with none, he is no less liable to pay for the past.

If a herd, belonging to a man who has disappeared, has increased, the fugitive owner, on his return, must be assessed in proportion to what the number of the herd may have been in each of the years of absence beginning with the first. But in this case, must one credit the declaration of the owner ? Al-Mâzirî[1] furnishes, in answer to this question, two different opinions, to wit :—one in the affirmative, under all circumstances ; the other in the negative, when the individual returns without any intention of meeting his obligations.

When a collector has asked an owner for the number of his herd and the herd, when counted, is found to be more or less than the number declared either by reason of deaths, or of slaughter, or of births, etc., the collector must base his calculations on the number which he himself may find.

[1] Al-Mâzirî, see p. 9.

It must be said that there is difference of opinion among modern jurists touching the procedure to be followed regarding erroneous declarations, which give more than the real number, and no clear decision has yet been come to. According to some, the owner's declaration must be accepted as true; according to others, a second count must be made.

Upon the herds of dissenters and schismatics[1] the tax is also taken, arrears being paid from the period of their secession from orthodox Islâm; unless they allege a payment of the tax, in which case their declaration is acceptable and sufficient. But their declaration is without value and must be rejected, if they have forsaken orthodoxy with a view to eluding the tax.

Section II

Of Assessments[2] upon Products of the Soil

Sub-section 1. Of assessments upon cereals, seeds, olives and raisins.

On grain, oil-seeds, beans and peas, there is levyable a tax of one-tenth of the crop, even when grown on *kharâj* or rent paying lands.[3] The minimum assessable quantity is five *wasḳ*.[4]

But if these crops are grown under irrigation the tax is only one of one-twentieth.[5] The full tithe, and not the half tithe, is, however, to be imposed when the land is irrigated by water brought to the land at the expense of any person other than the cultivator himself.[6] The difference in favour of irrigation, when the works themselves have been established by the cultivator, is held to be a remission in consideration of the expense involved; for the Prophet has said: 'All that which is watered by the heavens or by springs owes a tax of one-tenth'.

Under the general heading of 'grains,' employed by Khalîl in this chapter, the commentators distinguish nineteen sorts of grain, under three different classes:—

[1] The Copts of Egypt must have been included under this designation, for at any rate in the days of Mehemet Ali they paid, in common with the Muhammadans, the tax known as *firdeh*, i.e. *zakât* (Lane, II. p. 289).

[2] *'Ushr* or tithes on the fruits of the soil.

[3] See p. 82, note 2.

[4] The *nisâb*, or legal assessable minimum, is about twenty-one bushels; cf. Perron, I. p. 562; Lane, II. p. 326.

[5] The *kurdin rafi* of Hausaland.[a]

[6] Perron's translation is here most involved and obscure. It appears that crops irrigated by means of a *shadûf* erected by the cultivator himself and using water for which there is no charge, pay but one-twentieth; whilst if the water itself is paid for, or if the works have been undertaken by Government or the landlord, the crops pay the normal one-tenth.

[a] In practice *kurdin rafi* is illegally assessed at a higher rate than the normal *zakât*; probably because the cultivators of irrigated gardens are usually strangers.

I. Leguminous grains, to the number of seven : chick peas ; beans ; haricots or broad beans ; lentils ; lupins ; field peas ; and ordinary peas.

II. Grains or more properly cereals, to the number of eight : wheat ; barley ; soult [1] (the ' gymocrithon ' of the Greeks, or the ' tragos ' of Dioscorides) ; Arabian wheat [2] (' tritici genus bicoccon ') ; rice ; guinea-corn (' pennisetum typhoideum ') ; millet (' sorghum vulgare ') ; maize (' zea mays ') ; and, finally, dried grapes or raisins.

III. Oleaginous grains, to the number of four : olives, sesame [3] ; the seeds of the horse-radish tree (' moringa aptera ') ; safflower seeds.

The crops in Class I may be totalled together in order to make up the *niṣâb*.

In Class II, wheat, barley, and rye may be totalled together for the purpose of making up the *niṣâb*, but in the case of rice, guinea corn, millet and maize, each crop taken separately must amount to the *niṣâb* before it can be assessed.

In Class III each different crop must amount to the *niṣâb* reckoned in seed. The tax, however, is payable in oil crushed from the assessed seed.

In all cases the *niṣâb* includes gleanings, and any portion of the crop given in payment to labourers or harvesters.

Sub-section 2. Of the period of collections. Of the assessment of produce which has been inherited or sold.

The appropriate time for the collection of the taxes upon grains and fruits is, in the case of grains, the season at which they arrive at full maturity, that is, the period at which they no longer require to be watered ; when their sap is exhausted and dried up and they can no longer lose the development which they have attained ; in the case of fruits the season at which they are ripe and fit to be sold : when the dates are red, the grapes sweet and the olives black.

When agricultural produce, of which the grain and fruit are not of assessable quantity, becomes part of an inheritance before the season of maturity of these grains and fruits, the quantity must not be assessed ; unless the inheritor already personally possesses such a quantity of grains and fruits as may, when united with the products of his inheritance, constitute an assessable quantity. But, in this last supposition, he can only be taxed when all are ripe.

The legal assessment is to be levied from the farmer who has given away, in presents or in alms, or has sold his grain or his fruits (in all or in part) after they have reached maturity ; for he had enjoy-

[1] Probably rye.
[2] A kind of oats is probably meant.
[3] Or beni seed.

ment of them at the time the assessment was due, at which time the poor were his co-partners relatively to the tenth or half tenth of his possessions. But if the individual cannot be made to pay the tax, (if he have disappeared, or if he have lost or spent the proceeds of his sales, etc.), the tax must be recovered from the purchaser or other receiver.

The cost of upkeep or other charges, entailed by the partial or entire bequest of a crop, must be charged against the legatee, even though the legatee inherited either before or after the season of maturity ; since the testator was in full enjoyment of the property at the time of his death. This cost can never be charged to the poor.[1] When, however, the legacy is in a number of measures of grains or of fruits, the cost of upkeep remains as a charge against the estate of the deceased until the moment of maturity.

Sub-section 3. Of the assessment on grapes and dates.

The quantity of grapes and dates (usually intended for desiccation, is to be judged at sight before they are gathered and when they are ripe enough to be sold. Dates should be estimated tree by tree) so as to avoid too rough a calculation and one, moreover, which may be to the detriment of the proprietor. Care must be taken in estimating grapes or dates to make a deduction for the loss in weight involved in drying ; since it is on the number of *wasḳ* that the assessment is made. But nothing is allowed for ordinary losses ; windfalls, damage by birds, and other unforeseen accidents or causes. The Law, in particularly disregarding the first of these losses, has in view the benefit of the poor.

A single collector is sufficient for the assessment of these fruits ; but he must be a Muhammadan, upright, honest, and an expert in this particular work. This legal disposition was made in accordance with the example of the Prophet what time he sent a single collector to estimate the dates of the Beni-Khaibar. But if there be several collectors, differing among themselves as to quantities as estimated, the estimate of the most experienced among them must be accepted. If the collectors be all equally experienced, an average estimate is arrived at.

Should there be a partial or total loss due to accident after the assessment has been made, this loss may be taken into account when the tax is collected.

When the weight of these fruits, after they have been gathered, is found to be in excess of the estimate given by an honest and just expert, it is allowable to impose a further tax, proportional to this surplus. But in the case where the estimate is found to have been made in error above the true quantity, is it really necessary or not to

[1] That is, a rebate of *zakât*, considered as alms, cannot be granted.

remit a proportional part of the tax? Upon this point contradictory opinions are given by commentators of the *Mudawwanah*.

The assessment of products of the soil is made without reference to quality. This principle is applicable even to dates.

SECTION III

OF ASSESSMENTS ON GOLD AND SILVER

Sub-section 1. Of the assessment on gold and silver and on jewels.

On specie of greater value [1] than 200 *dirham* [2], the *zakât* is two and a half per cent.

Zakât is assessable on the property of a minor or of a lunatic.

The *niṣâb* must have been in the full possession of the payer for a complete year. By full possession is here meant that the owner of the specie, amounting to at least 200 *dirham* in value, owed no part of it during the year of possession, and that it was not originally treasure trove.

The assessment to be paid on sums which have been placed on deposit is calculated upon the number of years during which the deposit has been standing to the credit of the depositor.

The annual assessment is made in the same manner on sums put into circulation for trading purposes through a paid agent, for the agent becomes the representative of the owner. But the assessment is not made in this manner, that is, in keeping count of the number of years, on a sum which has been unjustly withheld from an individual or retained by violence; or on moneys which have been buried or hidden and of which all trace has been lost; or on money lost whilst travelling; or on sums given, without receipt or guarantee, to an individual under the condition that the individual himself may retain some part as profit.

[1] i.e., the *niṣáb* or legal minimum assessable.

[2] Before Islâm the Arabs had no money values. What they designated as wealth was always wealth in arms or accoutrements, in herds, horses, or camels. The Arabs only saw those moneys which came into their country from Syria, Mesopotamia or India.

At the beginning of their conquests, the Arabs adopted the moneys of the vanquished people. But when it became necessary to impose the first religious tax upon the Arabs themselves and to establish it as a permanent principle, the want of a monetary system was felt. The Prophet and the first Caliphs followed the example of other nations and established a currency for the Arabs based upon three coins. These are: the *dirham*, that is, the *drachma*; the *dînâr*, or tenth; the *kîrât*, or 4 grains. Of the three, the *dirham* alone has remained as a standard of comparison; the *dînâr* has often changed in value.

The *dirham* weighs 59·922 grains troy. The legal *dirham* is equivalent to sixpence, and the *dînâr* to about five shillings [a] (Perron, I. p. 564). The *dirham* here referred to is the standard one of Mecca; the *dirham* of Cairo weighs 48 grains; cf., Lane, II. p. 326.

[a] But Houdas (*Tuḥfat*, note 128) gives the value of the legal *dînâr* as just over 13 frs., i.e., 10*s.* 3½*d.* The *dînâr* was the gold unit as the *dirham* was the silver one.

No assessment may be made on moneys that have come into the possession of a person through a legacy or by way of gift, whenever such legacy or gift was in the nature of a windfall.[1]

In accordance with the same principle, no assessment is made upon sums due from an estate when more than a year has elapsed before distribution.

The Law exempts from assessment gold or silver in the possession of slaves ; money possessed by an individual but owing to his creditors ; the value in excess of the intrinsic value which is acquired by gold and silver through minting or through the art of the jeweller ; also damaged jewellery, which it is proposed to repair ; and jewellery which it is intended to lend.

But ornaments or jewellery may be taxed if they be utilized in a manner prohibited by the Law, e.g., as man's gold rings or bracelets, or as domestic utensils of gold, or if they be retained in anticipation of reverses of fortune or of unknown wants of the future, for in this case they practically represent specie ; or if such jewels are kept as a bridal gift ; or if they be intended for sale, as objects of commerce. Such ornaments and jewels may be taxed, even though they form the setting of precious stones ; but the tax must be taken upon the weight of gold and silver alone, ascertained after the removal of the stones. If the separation of the stones be impossible without damage, an estimate must be made of the gold and silver in the jewellery.

Sub-section 2. Of assessment upon profits.

The assessment of profits on capital invested in trade is determined with reference to the time of possession of the capital out of which the profits have been made. The profits are added to the capital in order to bring the total up to the *niṣâb*, if the capital by itself was not sufficient, and under all circumstances profits are added to capital in order to calculate and assess the tax.

Even though one day only may have elapsed since the profits were realized, the trader must pay the tax on the sum total of his capital and profits for a whole year ; for profits are born of capital, they are its fruit, and this establishes the maxim in jurisprudence : the year in which profits were realized is the same as that during which capital was held.

The same rule applies to profits on the sale of grain produced on land that was rented for the purpose of growing crops for the market. As soon as such a tenant realizes the profits on each year's speculations, he at once becomes liable to one whole year's assessment. So also he who, for example, has had in his possession twelve *dînâr* during

[1] The idea being that a windfall is from God and therefore not taxable. But sums which have come into possession of an heir through an ordinary succession are assessable ; see Chapter LV.

a period of eight months and then buys goods which he resells four months later for twenty *dînâr*, is liable to a whole year's assessment, as soon as ever he has realized the sale; for the Law considers him as having been during a whole year in possession of a capital which, at the end of twelve months, has amounted to the minimum taxable amount, viz. twenty *dînâr*.

When profits are made by trading with borrowed capital or on goods acquired on credit, such profits are liable to tax from the date on which the loan was contracted or the goods acquired, provided the profits amount to the *niṣâb*. Thus, if twenty *dînâr* be borrowed and goods purchased with this amount, or if twenty *dînâr* worth of goods be obtained on credit, and if these original twenty *dînâr* at the end of a year realize a profit of thirty *dînâr*; then the assessment will be on the profit of thirty *dînâr* reckoned from the date when the capital of twenty *dînâr* was first obtained.

Lastly, profits made on a part only of a capital sum, the balance of which was then expended, are to be reckoned for purposes of assessment together with the sum that has been expended, if at the time of the placing of the one portion of the capital into trade, the sum total of the capital, even though less than the minimum assessable amount, had been possessed for one complete year. For example, a person having possessed twelve *dînâr* during a whole year buys goods with seven *dînâr* and spends the remaining five *dînâr*; later, either a short time after the purchase of the goods or two or three years or more, he sells these seven *dînâr* worth of goods for fifteen *dînâr*; he would then have to pay tax on twenty *dînâr*; for he possessed during a whole year twelve *dînâr*, of which seven *dînâr* formed the capital out of which he made fifteen *dînâr*, which are added to the five *dînâr* which he had at the time when he bought the seven *dînâr* worth of goods out of which he made fifteen, and which then virtually represented a sum of twenty *dînâr*. It is here supposed that the goods on which he made fifteen *dînâr* were in his hands at the same time as the five *dînâr* which he afterwards spent. But if the five *dînâr* had been spent before he had bought the goods, they can no longer be added to the fifteen *dînâr* made on the goods purchased later; the tax would only have to be paid if the sale of the goods had realized twenty *dînâr* instead of fifteen.

Sub-section 3. Of the reckoning of the legal year of enjoyment of recently acquired possessions; of the combination of recently acquired moneys and chattels with those of anterior date with reference to the period of enjoyment.

The legal year of enjoyment, for a taxable quantity of monetary values, commences from the moment the individual has become the absolute possessor. But this disposition of the Law only affects those

values which are not the fruit or product of any other value already possessed by the individual in question ; those values, that is to say, which really result from a gift, an act of good-will or a legacy, or which are derived from the value of objects used for domestic purposes and which have been sold. Values thus accruing which are below the legal assessable figure, can be added to values which have accrued in an analogous manner ; and these two last values may even be added to a third and so on, in order to make up a sum subject to assessment, but the year of enjoyment commences only on the day an assessable sum has been completed.

Values thus received are not to be reckoned with values which have accrued at a later period, unless the former values have not been in possession, in a legal assessable quantity, during an entire year. If they have been from the beginning in assessable quantity, they are to be separately submitted for assessment, as having been in full possession of the individual for a whole year.

Sub-section 4. Assessment of loans.

Sub-section 5. Assessment of partly realized profits, etc.

Section IV

Assessment upon Chattels and Stock-in-Trade

Stock, in counter distinction to gold and silver, herds and lands under cultivation, is held to be of three different classes : viz. :— (*a*) trade stock ; (*b*) stock held for hire or letting ; (*c*) chattels of a personal or domestic nature not included in (*a*), (*b*). Tax is levied on these three categories either at their estimated value or selling value, but chattels that formed the subject of a gift or legacy are exempt from taxation so long as they are not sold. A year from the date on which such chattels were sold, their value becomes taxable. Chattels in class (*c*) are not liable to be taxed, if held with no intention of selling or trafficking in them.

It is usually during the first month of the year, the month of *Muḥarram*, that the tax is collected from traders ; they should then have their stock sheets ready, as also their balance sheets, in order to be able at once to satisfy the demands of the tax collector.

When a trader holds one part of his stock ready for the needs of his daily retail trade and another part in reserve intending to speculate with it at some later date, each part is differently assessed. The retail stock is added to the cash in hand and the whole taxed at the end of the year of possession, whilst the reserve stock is only taxed when sold after being held for a year. But if the retail stock is much greater than that in reserve, a stock sheet for the whole is made out, the value of the stock estimated, and added to the cash in hand, and on the whole value the tax is assessed.

Section V

Assessments in the case of Partnerships

Section VI

Circumstances which may or may not dispense with the duty of paying *zakât*

Debt is no cause for dispensation. The disappearance of an individual, even if he be a captive in the hands of an enemy, does not relieve him from assessment

Section VII

Assessment on values converted into *waḳf* and thus immobilized

Section VIII

Assessments on Mines, Treasure Trove, Flotsam and Jetsam

Sub-section 1. Of the exploitation and taxation of mines.[1]

Zakât is levied on gold and silver mines in the same manner as on specie.

The exploitation of all mines is regulated at the direction of the Sovereign. He may grant concessions, even before the conquest of the land has been begun, for has not God given Muḥammad His Prophet empire over heaven and earth? The finder of a nugget pays one-fifth of its value to the Sovereign.

Sub-section 2. Assessment of treasure trove. Of the exploration of ancient tombs and towns. Of flotsam and jetsam.

An assessment of one-fifth of their value is imposed upon treasure trove found hidden or buried in pagan tombs. Even though there may be some doubt as to whether the objects were hidden before or after the coming of Islâm, and even though the treasure should be less than the usual assessable minimum, or again, even though the articles may not be of gold or silver; the Law prescribes the assessment of a fifth of the value on these objects, whoever may have discovered them, be he slave or Infidel. If, however, the finder has been obliged to go to great expense to extract the treasure, or has had to make large excavations, the tax leviable is one of two and a half per cent on the value of the treasure trove.

The Law forbids any excavations of tombs of Pre-Islamic Arabs. Whatever may remain[2] of a precious object or of treasure trove after the assessment has been made, belongs to the occupier of the

[1] The law as to the manner of assessment does not appear to be at all fixed. Only in the matter of gold and silver nuggets is the law quite clear.

[2] It is here supposed that the tax has been paid in kind.

land upon which the find has been made. If the treasure trove was found on unoccupied land, it belongs to the finder and then cannot be taxed.

Objects of value thrown up by the sea, such as amber, belong to the finder and are not liable to the tax.

SECTION IX

EMPLOYMENT OF AND DISTRIBUTION OF *ZAKÂT*. *ZAKÂT* PAID BEFORE OR AFTER THE LAWFUL TIME. ASSESSMENTS ON SUCCESSIONS AND ON TRAVELLERS

Sub-section 1. Distribution of the *zakât* among eight classes of individuals. Circumstances entailing exclusion.

First Category. The poor and indigent, that is to say, those who are practically without resources, have a right to receive a portion of the collected assessment. A declaration of poverty and indigence will be accepted unless there are known facts to the contrary. The poor and indigent must be good Muhammadans. Nothing should be given to the poor who are not of the true faith.

The other necessary conditions are :—that the individuals claiming a part of the distribution should be free men, without means of subsistence, without the means of covering themselves, without any trade or industry which might give them the necessary means of subsistence ; and not belonging in the direct line to the family of Hâshim[1]; but this condition does not apply to the descendants of Muṭṭalib, brother of Hâshim.

It is illegal for a creditor to give any portion of the *zakât* to an insolvent debtor, and thus allow of its being used towards the discharge of his debts.

Second Category. It is permissible to grant a portion of the *zakât* to those who have been freed by the Beni-Hâshim, and to those who are only just able to support themselves with difficulty. It is permissible to give even to those who are possessed of goods of assessable value, when such goods do not suffice for the needs of a numerous family. Is it within the spirit of the Law to give a portion of the *zakât* to an insolvent debtor and subsequently to ask him for this amount in order to acquit him of his debt ? There is much divergence of opinion on this question.

[1] *Hâshim* was the great-grandfather of Muḥammad, son of 'Abdallâh, son of 'Abdal-Muṭṭalib, son of Hâshim. The direct descendants of Hâshim in the male line form the most illustrious branch of the great tribe of the Kuraish. The descendants of Hâshim by his daughters do not, however, share in this renown, for nobility is generally only transmitted through the male line. The members of the branch of the Beni-Hâshim, which was that of Muḥammad, were not admitted to the distribution of *zakât*, in order that their nobility might not be degraded nor abased. On the other hand, the Beni-Hâshim received a fifth of all booty that was due to the Sovereign. (Perron, I. p. 570.)

Third Category. The following are participators in the distribution of *zakât* :—the collectors and the distributors. Such men must, however, be Muhammadans, free men, upright and just, well versed in all the prescriptions of the Law relative to the assessment of *zakât* ; none amongst them may be Infidels nor direct descendants of Hâshim ; and finally the collectors, even though they may be rich men, share in the distribution of *zakât*, for this share constitutes their salary.

First and foremost, therefore, the collectors will be paid what is owing to them as salary. The poor and indigent will then receive a portion provided they are qualified. No part of the *zakât* may be granted to those who are placed in the position of being its custodians, and who are paid by the Public Treasury.

Fourth Category. A portion of the *zakât* may be granted to Infidels who are friends of the Muslim and who can be of some help in war, or who have leanings towards Islâm ; the portion being conceded to them in order to decide them to profess Islâm. Nevertheless, this permission of the Law must be dependent upon close examination of circumstances and opportunity. The grants can only be made to Infidels when there is real necessity for their services or when there is a certainty of their sincere desire to declare themselves Muslims.

Fifth Category. A portion of the *zakât* may be employed to purchase the liberty of a slave who is a Muslim, more particularly when he is suffering from some grave infirmity ; for example, if he be blind or of advanced age, for then he is in greater need of compassion and benevolence ; but there must be no form of contract or promise which assures to him absolute freedom in the future. A slave freed by these means remains under the tutelage of the Muhammadan community which acquires, so to speak, a hereditary general right in this freedman.

Sixth Category. A portion of the *zakât* may be granted to an individual to pay his debts, so long as these debts do not partake of a religious character. This rule applies even to a deceased debtor. It must be a condition of participation that the debt is of a nature which might entail imprisonment. No participation is permitted if the debts were contracted through bad conduct. If, however, the debtor repents of his bad conduct and resolves to amend his life, he may then receive a grant. In any case, grants from the *zakât* to a debtor will not be made until he has handed over to his creditors all the moneys he may have in his possession and given them the surplus of whatever he may possess.

Seventh Category. A portion of the *zakât* is to be devoted :—to those fighting against the Infidel ; to the purchase of war material and of horses required by the army. Such grants may be made to the fighting men even though they may be well to do.[1]

[1] In practice, and from very early times, the *zakât* has been used mainly for purposes under this category, which, according to Hughes, p. 700, is known as *fi sabîl Allâh*, i.e., in the service of God.

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Spies may receive payment from the *zakât* even though they may not be Muhammadans. No part of the *zakât* may, however, be used for the construction and upkeep of fortifications, nor for works entailed by a defensive war against Infidels, nor for the construction of war-ships, nor for the building of mosques. Bridges also may not be built, nor the dead buried, out of *zakât* funds.

Eighth Category. From *zakât* may be taken so much as may be necessary for the repatriation of a stranger, he being a free Muslim, who has need of help. This grant may, however, only be made to the stranger under certain conditions:—that his voyage was not undertaken with any criminal intent; that he can find no one who can lend him what he requires, even though he be a man of substance in his own country. The word of a stranger who declares that he is in want should be believed.

Sub-section 2. Methods of distribution of the *zakât*.

To the poor and unfortunate will be devoted twice as much as is granted to all the other categories grouped together.[1]

Sub-section 3. Of the valuation of specie and bullion in certain cases. Of the defacement of coins.

In the case of jewels or articles made of gold or silver, it is the intrinsic value of the precious metal that alone is assessed.

The defacement of coins is unlawful, though coins may be melted down.

Sub-section 4. Of the manner of paying the *zakât*.

It is a religious obligation for the Muslim, when paying *zakât*, to give of his wealth the prescribed portion, with the sincere and pious intention of giving.[2] This intention must be felt, both at the time in which he takes of his wealth, and when he hands it over to the collector.

Distribution of *zakât* must be made in the same district in which it was collected. The distribution should not be extended to the penurious inhabitants of other districts, unless there are none in the district of collection. In such a case, the cost of transporting the tithes will be charged to the Public Treasury.

Sub-section 5. Of *zakât* paid in before or after the lawful period. Of abuses which should be avoided.

It is outside a Believer's duty, and contrary to rule:—(1) to pay *zakât* before the legal period, on those crops which are subject to the

[1] It is possible that Dr. Perron is here in error in his translation from the Arabic. At any rate it is certain that the theory of distribution was: to each category one ninth, but to the first two ninths. Cf., Houdas, p. 149.

[2] In reality there is no question of almsgiving, even though there must be a pious intention when the collector demands the tax. *Zakât* has nothing to do with *ṣadaḳah*, which is the voluntary and private giving of alms.

tenth or twentieth ; (2) to advance on credit the amount of the assessment ; (3) to advance the amount on the security of goods in stock ; (4) to transfer the collected tithes and then to distribute them in a district where the need is not so great as in the district in which they have been collected ; (5) to attempt to include in the distribution individuals who have no right therein and from whom it will be impossible at a subsequent date to recover the sums so distributed ; (6) to consent to pay the tithe to a collector who, there is reason to suppose, has dishonest intentions ; (7) to consent to the payment of *zakât* in cash instead of in kind. But in the last two cases the Law attaches no blame to the individual who, though consenting to pay, has protested and expressed his repugnance to do so.[1]

Sub-section 6. Taxes on successions.

An assessment is made on all property left by a deceased person. The payment of this assessment may be enforced by arms if there is any resistance on the part of the executor or heir ; moreover, a refractory heir who may resist this assessment may be brought to his senses by means of punishment. All such assessments are paid to the Imâm when he is a man of justice and of probity.

Section X

Of the Alms on the breaking of the fast of *Ramadhân*

Sub-section 1. Of the nature of the alms. It is an obligation on the Faithful to give alms to the poor on the breaking of the fast of *Ramadhân*.

The evening of the festival [2] is the time to be preferred for the giving of these special alms. The alms consist of those food-stuffs which the giver habitually uses.

Sub-section 2. Of the amount to be distributed in alms.

The amount to be distributed is proportionate to the number of dependants comprised in the household.

Sub-section 3. Of the quantity to be distributed in alms.

The Law lays down that the quantity of grain to be given in alms must be one *ṣa'* [3] for each Muhammadan member of the household. The alms should be handed to the Imâm who distributes them to the poor.

[1] It should be noted that it is the intention of the Law that *zakât* should be paid in the same kind of produce or live stock as that upon which it is levied. This was actually the case in Nigeria, though in Algeria the Turks long collected the *'ashur* or *zakât* in cash.

[2] As the first hour of the Muhammadan day begins at sunset, the *'Îd al-Fitr* (Hs. *Karamin Salla*) begins on the evening of the last day of *Ramadhân*.

[3] A *ṣa'* is slightly less than half a bushel. Cf., Perron, I. p. 561 ; Lane, II. p. 326.

Sub-section 4. Of the giving of alms [1] by strangers. Of alms-giving before the day of the festival. Of the recipient of the alms. Of failing to give. The recipient must be a free man and a Muhammadan.

[1] Though a religious obligation and one like other institutions of the Prophet tending to unite all Muhammadans, whatever their social standing, status, or race may be, in one common bond, the 'Pascal Alms' referred to in this section have nothing to do with *zakât*; they should more properly come under the head of *ṣadaḳa*, or alms giving.

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CHAPTER IV

FASTS

SECTION I

THE MONTH OF THE OBLIGATORY FAST, OR MONTH OF *Ramadhân* [1]

Sub-section 1. Of the commencement[2] and end of the fast.

THE fast of *Ramadhân* begins from the moment when any two conscientious Believers first saw the new moon; it ends on the apparition of the next new moon.

Sub-section 2. Of days which are called doubtful[3]. Of the moment when the daily fast may be broken.

As soon as the sun has disappeared below the horizon[4] the fast should be broken by taking a little light food preparatory to the evening meal.

During the fast, the use of tobacco[5] is prohibited.

[1] The Fast of *Ramadhân* was instituted by Muḥammad: Korân, Sura II. (Sale, p. 19.) Therein it is prescribed that the fast may, if absolutely necessary, be compounded for; that cohabitation at night is permitted, as also eating and drinking, until such time in the morning when a white thread can be plainly distinguished from a black thread (but see note 4, *infra*); and that the Faithful should be constantly present in the places of worship.

The fast commemorates the month in which the Korân was sent down from Heaven.

[2] As Muhammadans count by lunar days, they are seldom certain of the first day of their months. They do not begin the month, more particularly when determining the first day of *Ramadhân* and the Feast of *Fiṭr*, or first day of *Shawwâl*, which is the following month, till they perceive the new moon. No almanac can or may replace this testimony of the eyes. (Perron, I. p. 552.)

[3] By doubtful days Dr. Perron apparently means those days in the year which may not be kept as fasts but must be kept as festivals. These days are:— the Feast of the breaking of the Fast and the four days of the Feast of the Immolation; see p. 24, note 5.

[4] In Hausaland the custom is not to break the fast so long as the hairs on the back of the hand can be seen.

The daily fast begins from the moment when the white streak and the black streak seen in the Eastern sky at the first appearance of daybreak can be plainly distinguished. (Lane, I. p. 114.)

[5] The lawfulness of tobacco to the Muhammadan is warmly disputed. The *Wahhabis* have always maintained its unlawfulness, and even other Muhammadans hardly contend for its lawfulness; but it has become generally used in Muslim countries. (Hughes.) Amongst the Muhammadans of the School of Mâlik in West Central Africa tobacco is not considered lawful; it is probably considered *makrûh*, i.e., that which is generally held to be unclean.

Sub-section 3. Of supererogatory fasts. Of compensatory fasts. Of alms which may take the place of fasting.

It is meritorious to fast: during the days preceding the festival of the Immolation[1]; on the day of *ʿashûrâ* [2] and on the ninth day of *Muḥarram*.[3] It is also meritorious to fast during the whole of the months of *Muḥarram*, and *Shaʿbân*.[4]

Compensatory fasts are those days kept as fasts in satisfaction for days of obligatory fasting involuntarily omitted. There should be no delay in keeping these compensatory fast days.

If, on account of advanced old age, the fast of *Ramadhân* cannot be kept, alms may be given in lieu of fasting.

Sub-section 4. Of acts which the Law reproves during the fast.

The Law reproves such acts as tasting food in order to see whether it is sufficiently salted; the mastication of any food-stuff, even though it be not swallowed; or the taking of medicines unless absolutely necessary. All lusts must be carefully guarded against.

Section II

Of the Conditions required in order to render the Fast valid

A fast, whether that of *Ramadhân*, or a votive fast, or a compensatory or expiatory fast, or a fast of supererogation, is only valid if the following conditions have been fulfilled:—(*a*) the intention to fast must have been positively expressed; (*b*) in the case of women all traces of menstruation must have been removed before the first light of dawn; (*c*) the person must be in his right reason.

Section III

Of Works in satisfaction for days of Fasting that have been omitted

Sub-section 1. Of compensatory fasts.[5]

Sub-section 2. Of expiatory fasts.[6]

[1] Or 'Day of Sacrifice,' in Hausa, *Boban Salla*, which is observed throughout the Moslem world at the time when the sacrificial rite is being performed at Minâ which closes the greater pilgrimage. (Muir, p. 188.)

[2] Or 'Fast of the Tenth,' which occurs on the tenth of *Muharram*. The fast was copied from the Jewish fast of the Atonement (Lev. xxiii. 27). See Lane, II. pp. 145–154; Muir, p. 185. The fast is scarcely observed in Hausaland.

[3] The eve of *'âshûrâ'*; cf., Lane, II. p. 148.

[4] In pre-Islamic days the months of *Muḥarram* and *Rajab* were two of the four months of truce. During *Shaʿbân* the Prophet, according to tradition, was wont to fast continuously.

[5] See section 1, sub-section 3. The present sub-section contains nothing of importance.

[6] Or penitential fasts in expiation of voluntary omissions.

Sub-section 3. Of circumstances which do not necessitate the keeping of compensatory fasts.

Sub-section 4. Of things permitted during the fast.

The use of a tooth-pick or the perfuming of the mouth is permitted; for the Prophet himself did these things so as to give his prayers a sweet odour. When thirst becomes unbearable the mouth may be rinsed out. Dispensation from fasting is granted to a sick man on a medical certificate. A woman nursing her child need not fast.

Sub-section 5. Of the keeping of compensatory fasts.

Section IV

Of Votive Fasts [1]

[1] These devotional fasts are the result of vows made in order to obtain some material success.

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CHAPTER V

SPIRITUAL RETREATS[1]

Section I
Of Retreats in general

Section II
Of Interruptions whilst in Retreat

Section III
Of Women and Slaves going into Retreat

Section IV
Of Retreats of one Day

Section V
Of Novenas

Section VI
Of the Place of Retreat

Section VII
Of Things allowed and Things prohibited whilst in Retreat

Section VIII
Of Precautions to be taken

Section IX
Of a Traveller substituting the Fast of *Ramadhân* for some other Fast. Of Women and Fasts of Supererogation.

[1] Full directions are given by Khalîl, but the practice is so rare that the chapter is not translated.

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CHAPTER VI

PILGRIMAGE [1] (*Ḥajj*)

Section I

Of the Duty of making the Pilgrimage and Visitation [2]

TO make the pilgrimage to Mecca (*Ḥajj*) at least once in a lifetime is one of the duties of every Believer.

Section II

Of the Conditions and Personal Obligations with respect to the Performance of the Pilgrimage

The pilgrimage is not incumbent upon a slave. The Believer is not bound to undertake the pilgrimage if he fears for his person or his goods. This, however, does not cover the exactions of chiefs of the countries through which he may pass, or the extortions of robbers.

In order to perform his duty, it is lawful for the Believer to reduce his family to beggary, for Providence will take care of them. Their poverty, however, and consequent privations must not be such that they will succumb. On the other hand, it is unlawful to undertake the pilgrimage with the aid of a loan, or a gift, or of resources obtained by begging.

The Faithful may go to Mecca indifferently by sea or by land.

The duty of making the pilgrimage is equally incumbent on women and men.

Section III

Of Pilgrimage by Proxy

Sub-section 1. Of the three forms of pilgrimage by proxy. Obligations incumbent on the proxy.

[1] Though of great interest to the student of Islâm, this long chapter is of no practical utility to administrative officers. Section headings are therefore alone given. For the best account of the pilgrimage, the student is referred to Burton's *Pilgrimage to al-Madinah and Meccah*.

[2] The *Ḥajj* is performed during the month *Dhu-l-ḥijjah*; the *ʿUmrah*, or visitation of the Holy Places, can be performed at any time of the year.

Sub-section 2. Of losses incurred by the proxy.

Sub-section 3. Of the proxy's breach of contract.

Sub-section 4. Of the blame attached to a person who, without sufficient cause, performs the pilgrimage by proxy. Of the expenses of a pilgrimage by proxy; liability of an estate to cover same. Death of a proxy.

SECTION IV

OF THE FIRST CEREMONY ESSENTIAL TO THE DUE PERFORMANCE OF THE PILGRIMAGE

Sub-section 1. Of the *ihrâm*.[1] Of the periods and place to commence the *ihrâm* or pious preparation. The sacred territory of Mecca.

Sub-section 2. Of the importance of the intention underlying the performance of *ihrâm* and the several forms of pilgrimage. The comparative merits of these forms.

Sub-section 3. Of the form of pilgrimage called *tamattuʿa*.

SECTION V

OF THE SECOND CEREMONY

Sub-section 1. Of the seven circuits.

Sub-section 2. Of the circumstances that oblige the pilgrim to recommence or to interrupt the circuits.

Sub-section 3. Of the obligatory circuits on arrival.

SECTION VI

OF THE THIRD CEREMONY; THE RUNNINGS AT AS-ṢAFA AND AL-MARWAH

SECTION VII

OF THE FOURTH CEREMONY

Sub-section 1. Of the ceremony at Mount ʿArafat.

SECTION VIII

OF THE FOUR CEREMONIES

SECTION IX

OF THE CEREMONIES OF THE CIRCUITS AND OTHER DEVOTIONAL EXERCISES

Sub-section 1. Of the ceremonies of the circuits.

Sub-section 2. Of the 'runnings' between Mounts as-Ṣafa and al-Marwah.

[1] *Ihrâm* is literally the pilgrim's garment. (Hughes.)

Sub-section 3. Meritorious practices. The water of Zemzem.

Sub-section 4. The 'Stoning of the Devil'. Sacrifices.

Sub-section 5. The return to Mecca. Cessation of the *ihrâm*. The circumstances which necessitate a sacrifice of atonement. Of the expiatory throwing of stones.

Sub-section 6. The return to Mina. Latitude granted to certain classes of individuals with respect to their devotional exercises at the pillars of Mina.

Sub-section 7. Of the expiatory casting of stones, during the four feast days of the pilgrimage. Details concerning the ceremony of the throwing of stones.

Sub-section 8. Of the circuits to be made before departure.

Sub-section 9. Of the correct expressions to be used when referring to the pilgrimage.

Section X

Rules relating to the Conduct of the Pilgrim during the *Ihrâm*

Sub-section 1. Of the things forbidden, permitted or blamed during *ihrâm*. Simple expiations. Perfumes and aromatics prohibited.

Sub-section 2. Circumstances and acts which, during the *ihrâm*, always necessitate expiation.

Section XI

Of simple Expiation or *Fidâ'*

Sub-section 1. The application of the simple expiation.

Sub-section 2. The nature of the simple expiation.

Sub-section 3. Of the application of the *fidâ'* to sensual errors.

Section XII

Rules concerning the Expiation of Errors committed by the Pilgrim during the Pilgrimage and the *'Umrah*

Section XIII

Of Things Forbidden on Sacred Ground during the *Ihrâm*

Sub-section 1. Of the killing or wounding of game whilst on holy ground. Of the extent of the holy ground.

Sub-section 2. Of those animals which may be killed.

Section XIV

Of Expiatory Compensations

Sub-section 1. Of expiation on account of infractions of the Law as to hunting whilst on pilgrimage on holy ground.

Sub-section 2. Circumstances under which it is permitted to eat game. Other permissions and prohibitions. Rules with regard to the consumption of vegetables. The territory of Medina.

Sub-section 3. Of the method of determining expiatory offerings, and of how these are to be applied.

Section XV

Of Expiatory Sacrifices or *Hadi* in case of Failure to Comply with the Rules of the Pilgrimage or the *'Umrah*

Sub-section 1. Of expiatory sacrifice in general. Conditions governing the validity of the victim, the time and place of sacrifice. Of the blemishes in the victim.

Sub-section 2. Of stigmas and signs to be applied to the animals destined for sacrifice. Consumption of the sacrifice. The ornaments of the sacrificial victims to be given to the poor. Modes of performing the sacrifice. Of the milk and fetus of the sacrificial victim. Of lost sacrificial victims and such that have gone astray.

Section XVI

Of Inability to complete the Ceremonies of the Pilgrimage or of the *'Umrah*, after having assumed the *Ihrâm*

Sub-section 1. Of accidental impediments.

Sub-section 2. Of obstacles raised by husbands or by a master.

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PART II

CIVIL LAW

CHAPTER I

OF THE USE OF THE FLESH OF ANIMALS

SECTION I

RULES FOR THE USE OF THE FLESH OF DOMESTIC AND WILD ANIMALS

Sub-section 1. Of slaughtering.

SLAUGHTERING is an operation which must be performed by a Believer in full possession of his faculties. It consists in severing the wind-pipe and the two jugular veins in one operation without removing the knife, the cut being directed from the front and not from the side of the neck. If the slaughtering has been carried out as the Law directs, the meat is licit to the Believer, even though the slaughtering had been done by a Jew or Christian.

The Law considers as reprehensible :—

(*a*) the slaughtering of animals in the market place or in private houses ; the authorities should appoint a special place ;

(*b*) the selling to Infidels of animals destined for their religious festivals ; it is forbidden to hire out boats to them, or to give them palm branches for their ceremonies [1];

(*c*) the buying of meat slaughtered by an Infidel for his own use ;

(*d*) the buying of food with money either borrowed or received as a gift from an Infidel who has made the money by the sale of intoxicating liquor ;

(*e*) similarly the selling of an object to an Infidel who will pay for it with the proceeds of the sale of intoxicating liquor ; but such monies may be received by a Believer in discharge of a debt due to him on account of the capitation tax ;

(*f*) the eating of the hump of a cow, when the cow has been purchased or acquired from a Jew, (since God has forbidden the Jews to eat the hump).

[1] As on Palm Sunday.

It is forbidden to the Believer :—to eat the flesh of animals sacrificed in honour of the Cross of Jesus, or to accept alms given by Christians in the name of the Cross ; for to accept such offerings would be to condone the polytheism of the Christians.

The Law disapproves of the eating of meat which has been slaughtered by a eunuch, or an irreligious Muhammadan.

The Law disapproves of an Infidel being established as a butcher in the market.

It is permissible for women and young men to slaughter for Muhammadans.

Sub-section 2. Of game and fish.[1]

No blunt instrument may be used when hunting game.

Section II

The Formula to be used when Slaughtering

When a person is about to slaughter, there must be in his mind an intention to kill the animal outright and not to inflict pain.

As the slaughterer strikes, he pronounces the words (should he think of it) :—*Bismillah* ! in the name of God, or *Allâhu Akbar* ! God is great.

Section III

Of Things that are forbidden and Things that are blamed when killing Animals. Of certain Responsibilities

Sub-section 1. Things forbidden and blamed when killing animals.

Rules with regard to hunting.

Generally speaking it is forbidden to hunt those animals whose flesh is lawful, with any other intention than that of killing or domesticating them. Thus the Law forbids the hunting of animals with the sole intention of destroying them, or of keeping them in captivity for amusement's and curiosity's sake ; this the Law condemns as childishness. Again, there are cases where the Law considers the capture of birds or animals, to be subsequently employed in carrying letters, as of no utility.

It is even forbidden to catch certain birds in order to teach them to repeat the name of God. Should they, however, be taught to do so, they are not to be restored to liberty.

The Law permits the Believer to kill, with the object of destroying, those animals whose flesh is unlawful, such as the boar or wild pig.

The Law considers it blameworthy in a Believer :—(*a*) to kill animals, sheep and goats in particular, which are huddled together in depressions, since it would be difficult to turn their heads towards the *kiblah*, and moreover it is blameable to kill one animal in view of another ;

[1] Fishes dying of themselves are unlawful. (Hughes.)

(*b*) to remove the smallest fragment of skin, or to cut off the smallest particle of flesh, or to expose it to the action of fire before the animal be dead. Fish, however, but fish alone, may be exposed to the action of fire before they are dead; for fishes are not killed, and the exposure of a fish to the action of fire is but analogous to the death the butcher inflicts on the animal he slaughters; (*c*) to say when offering sacrifices, *aḍḥâ*, these words:—'O my God, from Thee do we receive and to Thee is due all sacrifice!' (*d*) to cut off the animal's head after severing the jugular veins and the windpipe, for this is superfluous.

In cases where less than half of the body has been torn off by dog or falcon, and should the animal, not at first wounded to death, have afterwards expired previous to being bled by the hunter; the part thus torn off shall be considered unclean, and must not be eaten, unless that part be the animal's head.

Game belongs to the hunter who first laid hands on it. If there are several at the kill, they must divide it equally.

If game be killed on private land, it must be delivered up to the owner of the land.

A domesticated wild animal must be returned to its owner when caught, unless such animal has become wild in the time since it escaped from its owner.[1]

Where a Believer has put up a wild animal and has succeeded, as was his firm intention, in capturing it in a net or trap belonging to another individual, with the result that both men have taken part in the capture; then the game so caught shall be divided between them, in proportion to the labour each has expended. But where game has been accidentally put up by a Believer, and is caught in a trap the property of another; it then belongs exclusively to the one who set the trap.

Sub-section 2. Of certain responsibilities.

A Believer who passes by a wounded animal and, though in a position to do so, fails to bleed it, is responsible to the hunter for its value unless the hunter eats of the flesh; in which case the Believer is free from responsibility.

The same legal principle applies where there has been neglect by one party, either through his words, actions or testimony, to save the life or property of another; or where disculpating evidence has been withheld, intercepted, or destroyed; thus allowing error or injustice to triumph.

Should death ensue through the refusal to supply some necessary object, such as thread to stitch up a wound, the party refusing the help that has been called for will be held liable for the *diyah* or blood-

[1] Cf., *animus revertendi* in Roman Law.

money. In the same manner will be held responsible the adult who refuses food or drink to another who is famishing.

Section IV

Of Circumstances under which the Law permits or forbids the eating of animal flesh; according as to whether the animal has been killed or has died

It is permissible[1] to eat of the flesh of an animal; provided that at the time of killing life was not already extinct (e.g., that there were visible movements of legs, eyes or tail); or if no signs of life were apparent, that blood flowed freely.

An animal may neither be slaughtered nor its flesh eaten, if it was wounded to death by means of a stone, by fall from a height or into a pit, by strangulation, by the breaking of the backbone, or by the rupture of the intestines.

It is lawful to eat of the flesh of an animal which has broken its neck, provided the backbone is intact.

Section V

Of Foods which are Permitted or Forbidden

Sub-section 1. Of foods that are permitted.

All food-stuffs that are free from any impurity are permitted to the Believer. Under food-stuffs the Law comprises both solid and liquid food. The meat of the following is lawful:—aquatic animals[2]; birds, including birds of prey; cattle, sheep and goats; also wild animals that are not carnivorous, e.g., hares, rabbits.

In a case of necessity it is preferable to steal food from another, in order to still hunger, rather than to eat the flesh of a dead animal; provided such stealing does not entail the highest punishment provided by the Law.

Should a Believer fail to succour a hungry brother, by refusing him food which he could spare, and should there be no flesh of a dead animal obtainable, then force may be resorted to. Under such circumstances the committing of murder by the hungry man would be excusable. Should he, on the other hand, be killed in the fight for food by the man who refuses to help him, the latter is guilty of murder.

Sub-section 2. Of forbidden food, and food that it is blameable to eat.

Forbidden is all impure food, both solid and liquid, such as the flesh of the pig, mules, horses[3] and asses.

[1] i.e., *mubâḥ*. It must be observed that in Muhammedan Law, animals are either *talal*, lawful; or *mubâḥ*, allowable (i.e., which is condemned, but still is lawful); or *ḥaram*, unlawful. (Hughes.)

[2] Unlawful in Shâfi'i Law, except fish.

[3] In Shâfi'i Law, horseflesh is *mubâh*, indifferent. (Hughes.)

The Law blames the eating of the flesh of the following wild animals : lions, hyenas, foxes,[1] wolves, cats, elephants, porpoises, leopards, tigers, bears, mongouse and dogs.

Section VI

Of Sacrificial Oblations or *Aḍḥâ*

Sub-section 1. Of animals which may be sacrificed ; of circumstances or blemishes which make them unfit for sacrificial purposes.

Sub-section 2. Of the proper time appointed for sacrifice. The physical qualities required in the sacrificial victims. Rules of conduct for the Believer who wishes to perform a sacrifice.

Sub-section 3. Of those things which a Believer may not do with respect to the victims in simple sacrificial oblations.

Sub-section 4. Of sacrifice in general. Consecration of the victims. Rights of heirs with regard to the sacrificial victims.

Section VII

Of Sacrifices at Birth, or the *'Aḳîḳah*. Of blameable practices

Canon Law ordains that a Believer should offer a sacrifice of one animal, such as a goat, sheep or ox, on the seventh day after a child's birth, between sunrise and sunset.[2]

It is blameable to organize a feast in order to eat the sacrifice. The sacrifice should be eaten in the intimate family circle and some of it given away to the poor in alms.

It is also a blameable proceeding to smear the new-born's head with the victim's blood, or to circumcise[3] or excise[4] the infant on the day of the sacrifice ; since this would be to imitate the Jews.

Moreover boys should not be circumcised, or girls excised, later than when ten years of age.

[1] Hyenas and foxes are lawful in Shâfi'i Law. (Hughes.)

[2] Arabs never give a child the same name as its father ; the family is only indicated by the form ; so and so, son of so and so. Certain names, such as Muḥammad, Osman, Omar, 'Ali, 'Abd-Allah, etc., are supposed to bring good luck and prosperity and are therefore often employed.

Before Islâm, Arabs often called their children by names which recalled their family or were considered lucky, or by such as might inspire terror in future enemies. For this reason they frequently chose such appellations as tiger, lion, wolf, etc. Their slaves, however, they called the rose, the flower, etc.

An Arab, asked why they gave such pleasant names to their slaves whilst they themselves took the names of animals, answered : We choose our names to impress and terrify our enemies, but the names of our slaves are chosen to give us pleasure. (Perron, II. p. 646.)

[3] Circumcision, *khitân*, is not once alluded to in the Korân. It is held to be *sunnah*, or founded upon the customs of the Prophet. Though an adult on conversion may dispense with circumcision, still it is considered expedient and proper for him to circumcise himself. (Hughes.) For full description of the ceremonial in Cairo, see Lane, I. p. 71 ; II. pp. 244–249.

[4] The excision of females is also allowed. (Hughes.)

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CHAPTER II

VOWS[1]

SECTION I

OF VOWS IN GENERAL. OF TERMS THAT DO OR DO NOT ESTABLISH AN OATH. OF CERTAIN OATHS THAT NECESSITATE OR EXCLUDE EXPIATION. OF PERJURY

AN oath[2] is a declaration which establishes as positive and obligatory that which was not so before.

An oath binds the conscience and becomes obligatory only when it is taken in the name of God or one of God's attributes, such as: by God! Oh, for God! By the essence of God! By His Majesty! By the Koran! etc.

If a Believer has first pronounced the words: 'by God!' followed by, 'I shall do such and such a thing', without intending to make an oath, the question whether he meant or did not mean to make an oath is left to the discretion of his own conscience. If on the other hand, a Believer says, 'I will do this or that', followed by the formula, 'by God!' he will, if he breaks his word, be considered to have perjured himself, and will have to make expiation.

An oath may also be characterised by the following formulas:—'I swear, or I certify that—or I protest that,' coupled with the implicit intention to say 'By God!' On the other hand, expressions such as: 'Thou hast my promise;—I give you my word;—God be my witness that—;—by the Prophet!—by the *Kaʿâba*!' do not constitute an oath.

An oath taken inconsiderately, relating to a fact believed to be the truth, and which afterwards proves to be erroneous, does not necessitate expiation; (e.g. 'I swear to you that Zayd did not come,' where the contrary proves to be the truth.)

[1] The Chapter is headed Vows, to distinguish it from Chap. XXXIX, which deals with Evidentiary Oaths.

The practice of swearing by God, not irreverently, or by the Prophet, is very common in all the countries of Islâm. *Wallâhi*! by God! is the most common form of oath, which many of them scruple not to make use of, with the view of obtaining credit to a falsehood; cf., Lane, I. ch. XIII; to which most illuminating chapter on the character of the Muslim the reader is referred.

[2] The Arabic term for an oath is *yamîn*; for a vow, *nadhr*. (Macdonald, p. 356.)

A conditional phrase such as : 'if it please God—' is, of course, not considered an oath. Words such as : unless, except, if ever, added to an oath, render the same null and void.

Section II

Of Expiation for Perjury, in cases where the terms of an oath have not been strictly followed

Sub-section 1. Nature of expiation. Of circumstances that render expiatory offerings insufficient.

Expiation for perjury consists in : giving one *mudd* to each of ten paupers, they being Believers and free men ; or giving them clothing ; or freeing a slave ; or in fasting for three days.

Sub-section 2. Of cases where expiatory offerings must be renewed.

Section III

Of the five Constituents of an Oath

Section IV

Violation of an Oath

Sub-section 1. Details concerning the different cases of the violation of oaths.

Sub-section 2. Of agency in the payment of debts at a fixed date and oaths re same. Other examples of violation of oaths. Periods over which the terms of an oath may extend.

Sub-section 3. Violation of oaths concerning particular matters and interests in civil life.

Section V

Of Vows or Oaths taken before God or for His Service

Sub-section 1. Of vows in general, and of obligations they entail.

Sub-section 2. Of different vows and how they are fulfilled.

Sub-section 3. Of promises to enter upon *ihrâm*.

Sub-section 4. Of vows that are illusory or void.

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CHAPTER III

WAR [1]

SECTION I

THE SOVEREIGN'S OBLIGATIONS. WAR IS A DUTY. NATURE OF THE DUTY. EXEMPTION FROM THE DUTY

EVERY year the Sovereign Imâm or supreme chief of Islâm must station a military force on the most exposed points of the territory of Islâm.[2] The force must be sufficient to oppose invasion by an enemy. Again the Sovereign will have to designate troops to escort the pilgrims to Mecca.

War is a conjoint duty [3] incumbent on all Muhammadans [4], even though it may be waged against one of their own chiefs guilty of treason, or against a chief who withholds the legal fifth,[5] or against an unjust and tyrannical government.[6]

[1] i.e., Religious war, *jihâd*; lit. an effort, a striving. (Hughes.)

[2] *Dâr al-Islâm*, abode of Islâm, as opposed to *Dâr al-ḥarb*, abode of war. To the Muslim, the whole world is divided into these two parts, and in the end the *Dâr al-ḥarb* must disappear into *Dâr al-Islâm*. (Macdonald, p. 55.)

[3] By a conjoint duty, the Law means a duty incumbent on all Muslims, but if accomplished by a certain number is not obligatory on the others. Thus every Believer is obliged to render the last rites to a deceased Muslim, but it is of course not necessary for all Muslims to come together for the purpose. Likewise, war against the enemies of the State is a sacred duty incumbent on the whole nation, but the duty is held to have been fulfilled when a number of the people have answered to the call. A Muslim capable of bearing arms must take part in the war. He has no right to any pay and, moreover, must himself make sacrifices on behalf of his co-religionists.

'Fight the Idolaters,' said the Prophet, 'war is stablished and will endure to the Day of Judgment'. The Infidels may be attacked for no other reason than that of the difference of religion. (Perron, II. p. 647.)

[4] War is the fifth of the five fundamental obligations of Islâm, of which the others are :—prayer, fasting, alms-giving, and the pilgrimage. (Houdas, p. 89.)

[5] Of the booty, see p. 79.

[6] M. Houdas, in his chapter on War, p. 174, writes :—In our day the fifth fundamental obligation of Islâm often loses its primitive character, in that war is sometimes waged against other Muhammadans. It serves then to mask political ambitions and gives a lawful appearance to fratricidal strife. In this manner, for example, did the Fulani in Africa justify their attacks on the black population already converted to Islâm. Under the pretext that certain negroes were not practising their religion with all desirable zeal, the Fulani declared them to be Infidels ; which enabled them not only to enlarge their borders at the expense of the so-called Unbelievers, but also to make slaves of many of them, in spite of the fact that the Law strictly prohibits the enslaving of any Muhammadan.

To fight when called upon is a duty incumbent on every freeman, —on every Believer over the age of puberty and capable of bearing arms. Other obligations of a public nature are those of propagating and defending the Law, its decisions and principles; of succouring each other; of protecting the weak against the strong; of bearing true testimony.

Whenever a Muhammadan country is unexpectedly attacked; then even those who are ordinarily exempt from bearing arms, that is, women, slaves and children, as well as the Faithful from neighbouring countries, may be called upon to fight; provided there is a local deficiency of men for the levies. In all cases the Sovereign's commands must be implicitly obeyed.

The following are also exempt from bearing arms :—the sick, lunatics, the blind, the lame, paupers unable to procure arms or to keep themselves, and slaves unless by special permission of their owners. Solvent debtors whose debts have become due but whose creditors are absent, are also exempt; such debtors may only go to the war with their creditors' assent, for the payment of a debt is a personal, positive, obligation; whilst going to the war is merely one due to the community. Insolvent debtors may bear arms without their creditor's assent. A son, whose parents refuse their assent, may also be exempted from bearing arms. An Infidel parent cannot, however, prevent his Muhammadan son from taking part in a *jihâd*.

Section II

Of Things Lawful, Permissible, and Forbidden in War

Sub-section 1. Rules for making war. War of extermination. Of prisoners of war. Of those to be spared.

Before hostilities are commenced, the Unbelievers shall be called upon to embrace Islâm; this call to embrace the Faith should be made in short and general terms. A delay of three days only may be accorded, and if they then refuse to embrace Islâm they shall be called upon to pay the capitation tax. This also should be done in the shortest terms: explanations should only be given if requested. If, however, the Unbelievers are the aggressors, the Faithful may fight without a preliminary summons. If the Infidels refuse to pay the capitation tax they are to be fought and exterminated, except for the women, (unless, indeed, they have taken an active part in battle,) the children, imbeciles, idiots, old men, impotent and sick people, the blind, and monks living in cloisters, who will be spared not because of their calling, for they are plunged even deeper than the others in infidelity, but because they live a secluded life similar to that led by women. Those who are spared by the Law and those whom the Sovereign has forbidden being taken prisoners, shall only

be allowed to retain just the necessary means of subsistence and no more.

The Muslim who kills an Infidel whom the Law spares and before that Infidel has become part of the official booty, or who kills an Infidel who has not been summoned to embrace Islâm or to pay capitation tax, shall only be obliged to ask God's pardon for the deed. He need pay no blood-money, unless the individual slain had been a monk or a nun, in which case the Believer shall pay blood-money to the co-religionists of the victim.

Monks and nuns retain their freedom, and it is forbidden either to kill them or to reduce them to slavery.[1]

The enemy is to be fought with all available means, with arms of every description, with fire and water, etc.; but fire and water are not to be used in cases where the Infidels have their women and children with them.

Sub-section 2. Of things forbidden in warfare.

No poisoned arms are to be used in war; it is, however, only a blameable act to poison the wine of an enemy.

It is unlawful: to call upon Infidels to fight in the ranks of the Believers, except as mercenaries to dig trenches or to make engines of war; or to send the holy Book to the Infidels, even though they should ask for it; or to carry the Book into the country of the Infidels for fear that it might fall into their hands, and thus be desecrated.

Again it is unlawful to go to war accompanied by women, unless they be in security.

It is unlawful to take to flight when the Muhammadan army is but half as strong as that of the enemy, unless the former be under ten thousand strong. Flight is unlawful even though the Sovereign may himself have fled.

It is unlawful to kill a prisoner in such a way as to inspire fear into the vanquished foe; but before victory any mode of killing may be resorted to. The Law also forbids the exposure as trophies of the heads of Infidels, except on the battlefield itself, where they may be placed on the heads of lances.

It is also forbidden to betray or deceive an Infidel, either in the case where an Infidel has given something to the Muslims in trust, or where a Muslim has given his parole not to attempt to escape.

No Believer is to take away from the booty any object which he is not allowed to use personally. He who diverts any part of the booty before it is brought together shall undergo bodily chastisement, unless he has declared his fault and has begged for pardon.

[1] This exception shows that when the Prophet instituted the *jihâd* it was the Meccan idolaters that he had in view. It was only later that *jihâd* became a means of religious propaganda. (Houdas, p. 169.)

In no case may a Believer be deprived of his share of the booty.

Sub-section 3. Of things permitted to the Sovereign and soldiers when engaged in war. Of the *dîwân* or centres of control. Of substitution. Of presents made to the Sovereign.

Even before the actual distribution of the booty a soldier is permitted to appropriate any of the following, provided he stands in need of them :—footgear, a belt, needles, food, including even cattle and fodder, all kinds of clothing, arms, or any animal that he may require for war or transport purposes. But all clothing, arms and animals must be returned to the booty of the army after the conclusion of the war, provided always that the soldier is not in absolute need of them.

The Law permits the fighting men to exchange their share of the booty.

The Sovereign is bound to apply the rules of Law relating to War even in the enemy's country.

The houses and farms of the Infidels may be destroyed in warfare, provided such destruction does not injure the Muhammadans themselves.

In warfare the Believers may kill any animal belonging to the enemy. All baggage belonging to the vanquished Unbeliever, which cannot be made use of, must be burnt.

The Sovereign may establish headquarters or *dîwân* in different parts of the country, one for the Egyptian soldiery for instance, and one for the Syrians. At each of these headquarters there shall be kept a list containing the names of the arm-bearing population.

A man who does not wish to take part in war may provide a substitute on payment. Both men must, however, be under the orders of the same *dîwân*.

In time of war *Allâhu akbar* is to be the password for all Believers.

A spy may be killed under all circumstances.

It is permissible for the Sovereign to receive presents from a foe superior to him in strength, but not from a weaker one. These presents must be credited to the general fund or *fai'*[1], unless the two Sovereigns were blood relations or otherwise connected.

It is permissible to make war upon the great and powerful nations, such as Rûm[2], for these are the nations called European ; or, again, upon the Turks who hold no revelation and have no religious Law.[3]

A Believer is free to fight any two Infidels single-handed, even

[1] The *fai'* is that part of the treasury which receives the tribute on land, *kharâj* ; the capitation taxes, *jizyah* ; and the import duties. See p. 79, note, 3.

[2] i.e., the Byzantine Empire which finally fell in A.D. 1453, A.H. 857.

[3] It was not till the thirteenth century that the Osmanli Turks became Muhammadans.

though it may mean certain death to him[1]; but single combat must be engaged in in an unostentatious manner, not for the sake of personal glory, but for that of the one true Faith.

Sub-section 4. Rules as to the treatment of the vanquished. Of single combat. Of the *amân*. Of treaties.

The fate of prisoners of war lies in the hands of the Sovereign who may put them to death, reduce them to slavery, hold them to ransom, or allow them to pay the capitation tax. Women and children may only be reduced to slavery. A pregnant woman shall not be exempt from the rule, even though her husband should be a Muhammadan.

Where a Muhammadan has promised to spare the life of an Unbeliever on condition that the latter surrenders his fortress or allows the Faithful to enter his country, the Believer shall be bound by such promise.

In the single combat, the rules drawn up as between the two combatants must be strictly observed.

The Sovereign may either ratify or annul any promises made by his delegates with reference to the sparing of the life of the vanquished. If the *amân*, or promise to be spared, has been granted after a victory, the Law forbids the killing of prisoners, but they may be reduced to slavery. If the *amân* has been granted before victory, the lives of prisoners shall not merely be spared, but they shall also be granted their freedom.

In the case where an enemy, relying upon the fact that he will be granted the *amân*, comes over to the Believers, his life shall be spared; or he may be sent home, even though the Believers had sworn to kill him. This rule applies also to the case where the stranger has been captured on the enemy's territory, or on the frontier of the two territories, provided nothing suspicious is found about his person.

Section III

On the death of an Unbeliever, who was not a captive and who was living away from the theatre of war, his estate goes to the *fai'*[2], provided no heirs are present in the country, and provided the deceased had definitely taken up his abode in the *Dâr al-Islâm*, and was not merely a stranger passing through at the time of his death.

The goods of an Unbeliever killed in action or taken prisoner belong to the Believer who killed him or who made him a prisoner.

The debts of an Unbeliever are to be paid out of his estate before it is disposed of.

[1] A special place in Paradise is reserved to those Believers who have died fighting. The martyrs (p. 28, note 1) will hereafter be recognised by the odour of musk exhaling from their wounds. (Houdas, p. 173.)

[2] See p. 76, note 1.

An Unbeliever embracing Islâm retains all his property, with the exception of any Muslim free men whom he may possess as slaves.

Should a Muslim in war time be guilty of illicit cohabitation with an Unbeliever, or should he steal any part of the booty, he will be sentenced to the prescribed punishment ; provided that, in the case of the theft, the punishment is only inflicted if the goods had been stolen after the booty had been collected together.[1]

Section IV

Of the immediate consequences of Conquest. Of the Legal Booty. Of Promises made to the Army with a view to encouragement

All lands which come into the possession of the Faithful through conquest, except waste and unclaimed lands,[2] become *waḳf*,[3] that is, are *tied up* immediately after the conquest has been completed. This was done by Omar [4] when he conquered Egypt, Syria and Irak.[5] Uncultivated lands may be conceded by the Sovereign to whom he pleases.[6]

[1] See p. 79.

[2] In Muhammadan Law, lands are considered under two categories ; waste lands and cultivated lands. Cultivated lands are those that have been vivified. Waste lands include urban and garden plots. In the eye of the Law only cultivated lands may be said to exist. (Worms.)

[3] See ch. xxxiv.

[4] Omar [a] refused to distribute the territories he had conquered. He made them over to the Muhammadan community, that is he made them *waḳf* or *ḥabs* [b]. By this means freehold was done away with, 'given to God', as the Muslims say, and the usufruct alone is retained by man.

When the land has become *waḳf*, it can no longer be sold or given or inherited. The only tithe-paying lands are those of the Arabian peninsula [c]; all other countries incorporated into the dominion of Islâm through conquest or capitulation, are in their nature tribute paying [d] from which results their being placed in *waḳf*. Neither the Sovereign himself, nor the cultivator, nor any representative of the Sovereign, has the power to dispose of the land itself. (Worms [e], pp. 122, 123.) (Perron, II. p. 648.)

[5] i.e., Persia.

[6] The whole system of Muhammadan land tenure derives from this paragraph.

[a] Omar, A.D. 633–634, the second Caliph and one of the four 'rightly-directed Caliphs.'

[b] *Waḳf* and *ḥabs* are synonymous but *ḥabs* is in Africa more particularly applied to religious endowments. Thus it may be said that the whole of Islâm (except Arabia) is under the régime of territorial *waḳf* ; whilst an individual may endow a mosque with a building which he entails or makes *ḥabs* for the purpose of being for ever used as a school. Territorial *waḳf* roughly corresponds to the English theory that all lands vest in the Crown, hence escheat. See also ch. xxxv.

[c] i.e., their produce pays tithe, or *'ushr*.

[d] But though no other tax can be placed on tithe-paying lands, tribute-paying or *kharâj* lands pay *'ushr* wherever Mâliki Law prevails, when the lands are in the occupation of a Muhammadan. If in the occupation of an Infidel, he would naturally also have to pay *jizyah*.

[e] This work, according to Professor O. Houdas, is still the best authority on land tenure in Mâliki countries.

Booty taken from the enemy is to be collected together and divided into five lots. One lot [1] is called the share of God and the Prophet, the other four are distributed among those who have taken part in the war.

The tribute paid by conquered lands or perpetual ground rent, the sacred fifth, the *fai'* [2], and the capitation tax, are all paid in to the *bait al-mâl* [3], or public fund. This fund may be applied to the construction and upkeep of mosques, bridges, harbours, or for the maintenance of the poor, or in payment of the Public Debt. The fund may also be used by the Sovereign to encourage the troops, but pro-

[1] i.e., the fifth.

[2] See p. 76, note 1.

[3] The Public Treasury of the Muhammadans, the *bait al-mâl*, or in full the *bait mâl al-muslimîn*, includes both the wealth and the revenues of the nation. Nowhere does this administration now exist uncorrupted, but at its institution it was divided into four departments :—

(1) The department of the Alms or religious gifts, *bait al-ṣadaḳa*.
(2) The department of the Booty, *ghanîmah*.
(3) The department of the *fai'*, or of the *kharâj* or State revenues.
(4) The department of ownerless property.

(1) The first department receives the fifth on all booty ; the tenth on all lands conceded to Muhammadans at the time of the conquest, or on lands whose vanquished owners, since converted to Islâm, have had their titles confirmed to them ; the *zakât*, and the tenth imposed on the *ra'âyaḥ* and on Unbelievers under Muhammadan protection.

(2) The second department takes charge of those lands which after the conquest have remained without owners, or that have been taken from their owners who have been allowed to remain on as tenants. This Department also takes charge of revenues derived from mines ; treasure trove ; etc.

(3) The third department, or that of the *fai'*, receives all taxes or *kharâj*, whether real or personal ; tribute ; the price of peace accorded to the vanquished ; also tithes and half tithes.

(4) The fourth chamber receives into its keeping lost property, the estates of those who have died leaving no known heirs or who have disappeared.

These revenues of the *bait al-mâl* are employed as follows :—

(1) The Alms : To the exclusive use of poor and indigent Muhammadans, of orphans, of needy travellers ; to the redemption of slaves and other pious works done in the sight of God ; also in the salaries due to the collectors of tithes.

(2) The *ghanîmah* : The employment of these funds is the prerogative of the Sovereign, for on him alone devolves the distribution of the *ghanîmah* ; but even here the Imâm must strictly follow certain rules, the first of which is that the funds must be expended for the public good.

(3) The *fai'*. In principle these revenues should be employed on behalf of the Muslim community and of Islâm. Thus, the application of this principle permits those under arms and their families, also the Ḳâḍi, Mufti and jurists, to participate. These funds again can be applied to the purchase of arms, horses, and other war material ; to the construction of mosques, bridges, roads ; the clearing of rivers, etc.

(4) Ownerless property. These funds are used to relieve the sick poor, to bury paupers, to bring up foundlings, to assist the infirm who are incapable of working ; they may also be used to build bridges, roads and caravanserais when not endowed.

The participation of magistrates and jurists in these revenues is a logical consequence of the principle which considers the services rendered to Islâm by the *'Ulamâ'* as of the nature of *jihâd* (Perron, II. appendix).

mises of reward should not be made until the troops are masters of the battlefield, and a promise of reward should not have the effect of animating the soldier merely to fight for a worldly gain instead of for the divine cause.

Section V

Of the Distribution of the Booty

Sub-section 1. Of those entitled to the booty.

The four-fifths of the booty which remains after deduction of the Sovereign's fifth are to be divided among Believers only; they being free men, of sound mind, and over the age of puberty, who have taken part in the dangers of the war.

The merchant who follows the army with the object of doing business, and the mercenary who digs the trenches or does other secondary work, shall also be entitled to a share of the booty; provided they have joined the army with a view to fighting the Infidels and have actually taken part in the dangers of the war. Anyone not belonging to these categories; such as women, even though they may have fought, slaves, lunatics, children under the age of puberty, or those who have not taken part in the war; has no right whatever to a share of the spoil. A soldier who has been invalided, or again any impotent or one-armed individual who has been useful to the army through his good advice and experience, though he has not actually fought, is also entitled to his share of the booty.

Sub-section 2. Of the respective shares in the distribution of the booty.

Exclusion from participation.

Where a horse or mare has been used as a charger, double the share due to the horseman shall be allotted, for horses are the mainstay in battle. The age and breed of the horse are of no importance, provided the animal was strong enough to take part in a charge or to cover a retreat.[1] A share is not given for a weak, old, or sickly horse, nor for mules, camels, asses, nor for any second horse the horseman may have ridden. If a horse belongs to joint owners, the legal share belongs to him who rode the horse in battle; he will have to pay to the other joint owners a proportional sum for hire.

If an individual or separate body of troops makes a capture, with the permission of the Chief or Sovereign, such a capture shall be considered as having been made by the whole army, and shall not be considered as the property of the said individuals or body of men. Conversely, if the army makes a capture, a separated body of men or individuals shall be entitled to their respective shares.

[1] It is well known that in battle the Arabs charged down upon the enemy, attacked with their swords or threw their lances, then falling back, charged again, and so on. These tactics are still in use with the Arabs. (Perron, II. p. 649.)

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The view that Muhammadans alone are entitled to share in the booty is rejected by most jurists. These urge that if Unbelievers have fought for the Muslim they shall also receive their share, and further that their share shall be given to them before the deduction of the fifth, which should be deducted from the Believer's share alone. On the other hand, if an individual or body of men makes a capture without the Sovereign's orders, or where there was no army in the vicinity to support them, the spoil belongs exclusively to those who captured it. A pillager pays a fifth of his plunder to the Sovereign.

Sub-section 3. Place and distribution of the booty. Of objects recognized by the original owner.

The rule, founded on the Prophet's example, is : that all booty must be divided among the soldiers in the enemy's own country, provided that this can be done with reasonable security. The distribution must take place in the presence of the Sovereign or his representative. Booty so distributed makes a painful impression on the enemy and gives satisfaction to the Believers.

There are conflicting opinions as to whether the Sovereign may sell the booty in order to facilitate the distribution. In any case God's share must not be sold.

According to Ibn Yûnus, the booty is to be divided as nearly as possible into five equal parts. A mother, however, must not be separated from her suckling child, nor may jewels be so divided up as to diminish their value.

Every individual, whether a Muhammadan or non-Muhammadan subject, is entitled to retake from the booty any object he recognises as having been his own personal property, provided he is a well-known man ; he will also have to make oath that the said object in fact did belong to him and that he had not alienated it by sale or donation. Should it prove not to be possible to return the object itself to the original owner, it shall be sold and the proceeds delivered to him. Should the object which has been recognised as belonging to a certain individual be distributed with the general booty, the object shall be gratuitously returned to the original owner. It is of essential importance that the original owner should be able to prove his claim to the object in question.

Sub-section 4. Of slaves who form part of the booty.

Sub-section 5. Of the disposal of slaves and prisoners. Of the repartition of parents and their children.

If a Believer or an Unbeliever paying capitation tax has received from an Infidel in *Dâr al-ḥarb* some chattel previously taken from the Faithful, and this chattel or slave is brought back again into *Dâr al-Islâm*, the original Muslim owner may take back the chattel or slave

without his having to pay any compensation, provided the said chattel was not sold to the person who brought it back.

The slave of an Infidel who takes refuge in *Dâr al-Islâm* is free. Even though he remain an Infidel, he is not to be enslaved.

If a slave of an Infidel becomes converted but remains in *Dâr al-harb*, and is then made a prisoner of war by the Faithful; he shall be free if his master remains unconverted.

The marriage of husband and wife who have been made prisoners of war by the Faithful is annulled [1] unless they embrace Islâm. If the wife alone refuses to be converted, the converted husband may only keep her as his concubine. All the children an Unbeliever may have had and everything he may have possessed in his country, before he embraced the true Faith, become the property of the Faithful as soon as they have conquered the country. If the children are very young and were born of a free Muhammadan wife or of a free non-Muhammadan wife who has been made a prisoner of war, they shall be free, even though they have fallen into the hands of the Faithful during a *jihâd*. The children of a woman slave become the property of the owner of the slave. A child is free or a slave according to his mother's condition, but belongs to the father's family and religion.

Section VI

The Capitation Tax [2]

Sub-section 1. Of the nature of the tax.

The capitation tax is an impost stipulated for, and approved by the Sovereign in a treaty, and imposed upon the vanquished.[3]

Capitation tax is imposed upon all adult males. Women, children, slaves, lunatics, paupers, monks, hermits, and the sick, pay no capitation tax. The Prophet decreed that no capitation tax might be levied on the inhabitants of the Arabian peninsula.

Sub-section 2. Amount of the tax. Manner of payment. Conversion exempts from capitation tax and other extraordinary taxes.

[1] This does not refer to Infidels who have capitulated, but to those who have been conquered after refusing to pay the capitation tax.

[2] In all codes of Law the term *kharâj* is specially used to designate the tax on land, whilst the tax on the individual or capitation tax is known under the name of *jizyah*. The *jizyah* is, as the name indicates, a compensation exacted by the law from every non-Muslim subject in return for his life and liberty. (Worms, *Revue de Législation et de Jurisprudence*. Volume XV, 1842.)

[3] Capitation tax (*jizyah*) is a tax imposed upon vanquished Unbelievers. The payment of this tax entitles them to the right of remaining, after defeat, under the protection and administration of the Muslim State, without having to fear for their lives. It was in the year 8 or in the year 9 of the Hijra, that capitation tax was first imposed upon a vanquished foe. All Unbelievers in a conquered country, even should they belong to the most noble of Arab tribes, are bound to pay this tax in return for the promise of being spared and not being sent into captivity. (Perron, II. p. 650.)

The capitation tax on tributary subjects who have been subdued by force is one of four lawful *dînâr*[1] or forty *drachma per capita* at the maximum. According to Ibn-Rushd the tax is to be paid at the end of each year. A poor man pays a sum in proportion to what he possesses.

Those who have become tributary subjects by capitulation or agreement only pay the amount stipulated for in the treaty. If no particular amount has been mentioned in the treaty, then they shall pay the same amount as imposed upon those subdued by force. Acceptation of the conditions of the tax involves a cessation of hostilities.

Capitation tax is to be levied in a manner humiliating to the payers; thus each individual must personally pay the tax to the collectors.

Acceptance of the true Faith, even though conversion be simulated, exempts the convert from all capitation taxes; from all extraordinary taxes on food-stuffs which may have been imposed by the Sovereign; and from the obligation to entertain Muslim travellers for a period of three days.

Sub-section 3. Of property and churches belonging to subject populations. Of certain prohibitions.

Infidels paying capitation tax are free and may not be enslaved.

In the case where Infidels have capitulated and where the capitation tax has been fixed on the whole population and not *per capita* nor on each individual holding[2]; the lands (i.e., the agricultural holdings) and all personality remain the property of the subject Infidels, that is to say, that each has but a possessory title thereto. An Infidel paying capitation tax is free to dispose of all his goods without exception, and may sell his occupancy right to land.

The total amount of the capitation tax can neither be increased nor diminished on account of the increase or diminution of the population, since all the inhabitants are jointly and severally liable for the due payment of the total amount. A tributary Infidel may make such testamentary dispositions as he pleases, may dispose of his personality in any way he chooses, and his inheritance is distributed in accordance with the terms of his will. The personal property of an Infidel who dies leaving no heirs reverts to his co-religionists, since the amount of the capitation tax imposed on the whole Infidel population remains invariable.[3]

[1] See p. 44, note 2.

[2] The *jizyah* may be imposed either as a poll tax or as a tribute from the conquered country. Once fixed the tax cannot be increased nor diminished. Besides the *jizyah*, subject peoples have also to pay the *kharâj* or land tax. Cf., Houdas, pp. 170, 171.

[3] The remainder of the sub-section is but briefly summarized. The whole of this important section VI. which treats of the capitation tax and the different forms of land rents, seems to require retranslation from the Arabic text of

In a country conquered by force of arms the inhabitants may lawfully build new churches or restore the old ones, provided it was stipulated for in the treaty. Many jurists maintain, however, that it is unlawful to allow churches to be repaired, for such an act is 'to honour and resuscitate the past which was reformed by Islâm'; to build new churches, on the other hand, is a matter of grace which may be accorded as a proof of Muhammadan generosity.

Churches may not be built in countries inhabited by Muhammadans.

No person subject to the payment of capitation tax,[1] may ride a horse or mule; he may only ride a donkey and that without a saddle and with both his legs on one side of the animal. He may not walk on the best part of the road and must wear a distinctive dress.

A person subject to the capitation tax found intoxicated away from the company of his co-religionists, or who has ostentatiously partaken of pork, or who has publicly manifested his particular religious beliefs, shall undergo bodily chastisement. He shall also be punished if he interferes with any Muhammadan ceremony, or if he attempts the propagation of his own beliefs, or if he is found carrying liquor about.

Sub-section 4. Of circumstances that annul the obligations of a treaty concluded with subjects paying the capitation tax.

A tax-paying subject is considered to have broken the obligations of the treaty and thus renders himself liable to be considered an enemy of Islâm:—

(a) If he takes up arms against the Muslims unless it be in a case of self-defence.

(b) If he refuses to pay the capitation tax or otherwise does not fulfil the conditions of the treaty.

(c) If he opposes the Muhammadan authorities.

(d) If he seduces a free Muhammadan woman.

(e) If he deceives a free woman by pretending to be a Muhammadan.

(f) If he betrays plans etc. for making war.

(g) If he has outraged the Prophet of Islâm by words, such as "Muḥammad is no Prophet," or "Jesus is the son of God."

In cases (d), (e), and (g), the tributary subject is put to death unless he become a convert to Islâm. In the other cases the punishment to be meted out is left to the discretion of the Sovereign.

Khalîl and those of his Commentators, and this in the light of fuller modern knowledge of the subject. The French text of Perron abounds in vague terms and contradictions, so that it is impossible to arrive at any exact comprehension of the Law. For further information consult *Recherches sur la Constitution Territoriale dans les Pays Musulmans* by Doctor Worms.

[1] Such a non-Muslim subject of a Muhammadan Government is called a *dhimmi*. The term only refers to Christians and Jews, people of the Book (*ahl al-Kitâb*); for idolaters were reduced to slavery and not given the option of paying *jizyah*. See Hughes, p. 710.

Section VII

Of Truces or Suspension of Hostilities

The Sovereign or his representative alone has the right of accepting a truce and may only do so if it is not unfavourable to the Faithful. Fear alone must not be the sole motive for making a truce.

There is no absolute limit as to the duration of a truce ; it should not, however, extend over three months.

As soon as the Sovereign is informed of a breach of the armistice, he shall re-open hostilities, after giving notice to the enemy.

The conditions of an armistice must be rigorously observed by the Sovereign ; for example, he must send back to the enemy any Muhammadan prisoners who may have taken refuge in his camp. If the enemy offers to return our hostages in return for theirs, these shall be sent back, notwithstanding the fact that they may be Muhammadans.

Section VIII

The Ransom of Prisoners

Muhammadans shall be ransomed at the expense of the public fund or *fai'* ; should the latter prove insufficient, then at the expense of the Believers themselves. If either of these means are insufficient, the prisoners shall be ransomed at their own expense.

A Believer who has ransomed a prisoner shall be refunded the expense incurred, provided there was no likelihood of the prisoner being ransomed by the Sovereign. The Believer who provides the ransom-money shall not be entitled to have his expenses refunded if the ransomed prisoner is related to him in a degree which excludes matrimony, or if the prisoner was married to him, provided always that the ransomer was aware of the relationship.

The prisoner who has commissioned another to effect his ransom, shall under all circumstances refund the amount of that ransom. A ransom debt has priority over all others. When a Believer provides the ransom of several prisoners, each of them shall refund him the same sum, unless their pecuniary position be known, in which case each prisoner shall reimburse a sum in proportion to his wealth.

Non-Muhammadan prisoners of war may be exchanged against Muhammadans in captivity, unless such an exchange is too dangerous an undertaking.

Conflicting opinions exist as to whether the Law permits Muhammadans to give horses, arms, or engines of war to the enemy in return for prisoners.

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CHAPTER IV

TOURNAMENTS

THE Law permits the organizing of horse and camel races, and of races between horses and camels.[1]

Elephants, mules, and asses, are not included on the ground that they are not utilised as mounts in battle. Rules to govern the various competitions must be drawn up. The laying of the odds is strictly forbidden.

In archery competitions, archers may use any bow or arrows they choose.

The social status of the competitors should be ignored.

Boys under the age of puberty are excluded from taking part in these competitions.

The prize need not necessarily be the same for whosoever wins. The giver of the prize may say, 'If so and so is the winner, he shall have such and such a thing.'

Handicaps are permitted.

If some accident or unforeseen incident should cause the arrow to swerve or should some accident cause the arrow to break; or should a horse in full gallop be hit; then the competitor thus handicapped shall not be considered to have been beaten.

All other competitions such as foot racing or wrestling, in short all exercises that appertain to training for warfare are permitted, but no recompense or prize may be given to the winner.

When shooting an arrow, or throwing a javelin, it is permissible to boast shortly of the fame of one's tribe or family in the art of using the bow, etc., also to recite verses and to shout words of encouragement. But it is always preferable to proclaim the name of God and say 'God is great,' rather than to draw attention to oneself.

The rules of a competition, if once accepted, must be adhered to by the competitors and can only be annulled by common consent.

[1] Exercises and games were sanctioned and organized in pre-Islamic days with the object of exciting military valour. They were meant as an apprenticeship to war. These competitions were analogous to the Olympic games of the Greeks, the circuses of the Romans, and the tournaments of the Middle Ages. (Perron, II. p. 650.)

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CHAPTER V

MARRIAGE AND DIVORCE [1]

SECTION I

OF THE DUTIES, PRIVILEGES AND ACTS RELATING EXCLUSIVELY TO THE PROPHET [2]

THE Section details the forty-one duties and privileges of the Prophet ; many of these privileges have for object to render lawful in him what the Law declares to be unlawful in all other Believers.

The 25th Article prohibited anyone from raising his voice higher than that of the Prophet. 'Thus to day the assembled *'Ulamâ'* should not speak in a loud tone of voice, for they are the spiritual inheritors of the Prophet, and the veneration and the respect which were his due in life are his after death also.' [3]

The 27th Article prohibits the mentioning of the Prophet by his name Muḥammad ; he should be referred to as 'the Prophet' or 'the Messenger of Allah.'

SECTION II

OF MARRIAGE [4] IN GENERAL

Sub-section 1. Requisite conditions and qualifications. Of the asking in marriage. Intimate relations. Necessity of witnesses.

It behoves that the Believer should marry when he feels the wish for it, be it to satisfy his carnal desires or because he wishes to have children ; provided he can afford the dower and the upkeep of a wife. A virgin is to be preferred. If the Believer is afraid of falling into the way of illicit pleasures, let him take a concubine. The Believer who cannot afford to keep a wife, or who is unable to fulfil the duties of

[1] Chapters V–XII are concerned with the Personal Law of the Muhammadans. For this part of the Law the student is referred to a most scholarly work which has just (1913) been published, *A Manual of the Law of Marriage, from the Mukhtasar of Sîdî Khalîl,* by A. D. Russell and Abdullah Al-ma' Mun Suhrawardy. This work gives the Arabic text with translation and copious notes, but omits nearly all the rules relating to slaves.

[2] The section being of no practical importance, a very brief summary is only given here.

[3] This accounts for the even, low tone of voice habitually adopted by all higher class Muhammadans.

[4] Arabic : *nikâḥ*.

matrimony, shall not marry. The same principles apply to women.

The proposal of marriage as well as the promise shall be clearly expressed, and shall state the names of the suitor and the girl or woman to whom proposal of marriage is made. The same applies to the act of marriage. These words shall be used: 'I give unto so and so, my daughter or sister, etc.'

The proposal of marriage is to be made in private and in the intimacy of the family circle; the marriage itself, on the other hand, is to be celebrated in public. The couple should be congratulated on their engagement, and after the celebration of the marriage, wishes for their happiness should be made, such as: 'May God bless you,' etc.

The marriage ceremony is to take place before at least two witnesses, honest and pious men, in addition to the *Walî*[1], that is, the bride's representative for the marriage contract. If the parties do not observe this rule, the marriage is to be annulled by judicial decree. If, however, the marriage was publicly celebrated, the parties shall suffer no punishment, even though the parties knew that the presence of two witnesses was necessary to render the marriage valid.

Sub-section 2. Prohibition concerning proposals and contracts of marriage, chiefly with regard to the *'iddah*.[2]

It is forbidden to propose marriage to a woman already reserved for, or engaged to, another man who is not dissolute in his habits or irreligious, even though he may not be in a position to afford a dower, and even though the woman's reservation or engagement is contrary

[1] The Arab word *Walî* which is translated by the general term 'representative' or 'he who has the right and power to' always implies, from the poin t of view of the Muhammadan community, the idea of relationship, either in a real or figurative sense. The word *Walî*, in fact, means 'relative.'

A *Walî* is also an individual whose duty it is to protect, to watch over, to second a woman; he is the representative of a woman about to be married; he is also the slave's master, the natural guardian.

The commentator al-Kharashi, in speaking of marriage, thus defines a *Walî*: 'By a *Walî* we mean a man who has the right and power to conclude a marriage-contract, even though he should be clothed with that right, provided the person he represents consents to this procuration.' Marriage is the most solemn act of civil life, and a married man is more in the eyes of God than the most pious bachelor: 'Marry the women who please you, to the number of two, three, and even four.'[a]

The marriage-contract is often made several years before the parties are in a position to cohabit. Small girls are often promised to a man of the same age or older than they. A'isha, the Prophet's favourite wife, said: 'I was married to Muḥammad at the age of six, and I was nine years old when he first cohabited with me.' This example is often followed in the East. (Perron, II. p. 651.)

[2] *'Iddah*, lit. 'number.' It is the term of probation incumbent upon a woman in consequence of a dissolution of marriage either by divorce or the death of her husband. After divorce the period is three months, after the husband's death four months and ten days, both periods being enjoined by the Korân, Sura LXV & II. (Hughes.)

[a] Korân, Sura IV.

to her own wish. This also applies to subjects paying capitation tax. A Muhammadan woman may refuse the man who has first proposed to her and then accept another. Where, contrary to the intention of the Law, a second individual has asked for the hand of a woman already engaged, and the marriage contract has been concluded, then the Law annuls such a marriage if it has not already been consummated. The woman is repudiated without receiving her dower, even though the contracting husband knew nothing of the agreement with the first suitor.[1]

It is forbidden formally and definitely to stipulate for a promise of marriage with a woman undergoing *ʿiddah*. Should, however, the woman not have been irrevocably repudiated, then he who has repudiated her may renew the marriage before the expiration of the *ʿiddah*.

The representative of a woman undergoing *ʿiddah* is also forbidden to negotiate a definite promise of marriage.

All preceding prohibitions also apply to a woman bound to observe continence after illicit cohabitation.[2]

The Law forbids a Believer ever to cohabit again with a female slave, if he has cohabited with her during the *ʿiddah*.

Sub-section 3. Of certain things concerning matrimony which are either permitted or blamed.

It is permissible for a Believer to speak to a woman still in *ʿiddah* of his intention to marry her, and to give her presents.[3]

He who has the right to contract in the name of a woman may hand over that right to some other pious man in order that God's benediction upon the union may be obtained.

It is permissible to give to either party information concerning their defects, excepting those which it would not be prudent or proper to disclose.

It is blameable for only one of the two parties to promise marriage to the other.

It is also blameable to marry a woman of bad repute.

He who decides to marry a woman already engaged to another Believer shall inform that Believer of his intentions, and the marriage of the former shall only take place if the latter consents.

Sub-section 4. Constituents of marriage.

The following conditions are requisite for a contract of marriage :—

[1] *Risâlah*, rules 16, 17, and notes thereon ; also Rule 98 and note.

[2] This period is known as *istibrâ'* ; its duration in this case is the same as that of *ʿiddah*. See also p. 141, and p. 143.

[3] *Risâlah*, rule 98.

1. A *Walî* or representative of the woman.[1]

2. A dower given by the future husband.

3. A *substratum* or basis of marriage. Both parties must be legally able to marry; e.g. no preventive illness etc.

4. A formal engagement consisting of some such words as these: 'I give thee as wife so and so,' or 'I give her unto thee upon condition of a dower of so much.' The suitor then answers, 'I accept.' The suitor may also, in the same form, ask the woman's representative for her hand.

Once this contract has been consented to, the marriage is binding, even though one of the spouses should revoke his or her consent.[2]

Sub-section 5. Of the power to impose marriage.[3]

Every Believer, man or woman, who possesses slaves, has the right to constrain them to marry, if no evil or disadvantage is likely to result from it. For example, a slave may not be constrained to marry another who is a lunatic. It goes without saying that a slave cannot constrain his master to marry.

No master having but partial rights over a slave, i.e. either partially freed or partially belonging to another master, can constrain him or her to marry. The master is, however, in such a case, the legal representative or *Walî* of a woman slave. In any case, the master is entitled to have the marriage contract annulled if the slave has married without his consent. If a partially owned female slave has married without her owner's consent, such marriage shall in all cases be annulled even though one of the co-owners of the slave should have consented to the marriage.

A father may impose marriage: 1. On his daughter who is insane. 2. On his virgin daughter, even should she be emancipated and old, unless he proposes to marry her to an eunuch or a lunatic. 3. On his young daughter, who is no longer a virgin either owing to an accident or to illicit intercourse.

A father may not impose marriage upon his marriageable daughter if she has lost her virginity through an illegal union and was not at that time emancipated; nor if that daughter, being a virgin and marriageable, is emancipated; nor in the case where she shall have lived with her husband, who subsequently left her, for one whole year, even though she declares that no sexual intercourse took place.

In all circumstances similar to those above described, the testa-

[1] See p. 90, note 1.

[2] A contract of marriage thus differs in this one particular from a contract of sale. Morand (p. 117) in his essay on marriage proves that, at any rate in Mâliki Law, marriage is the sale to the husband of full property in a woman in consideration of the payment of dower. Khalîl himself says (p. 106 *post*) that dower is analogous to a valuable consideration, or motive of a contract of sale.

[3] Cf., *Risâlah*, rules 5–14.

mentary guardian may give in marriage an orphan daughter in accordance with her father's wishes.

The testamentary guardian will be considered a near relation or the natural guardian of his ward who is no longer a virgin. This, however, does not apply to the case where a father had emancipated [1] his daughter and instructed her in a woman's duties.

In short there are but three persons who may by law exercise the power of constraint : the master of a slave, the father, the testamentary guardian. Other *Walîs* can only conclude a marriage contract, and then only if the girl has attained the marriageable age and gives her consent. To this rule there is but one exception : that of an orphan girl [2] who may be constrained to marry if there is any likelihood of harm befalling her if she remains single. But even then she must have completed her tenth year, permission must be obtained from the Ḳâḍi, and the girl must show some desire of getting married.

Sub-section 6. Of those who have the right to conclude a marriage contract on behalf of the woman.

The powers of a *Walî* [3] devolve in the first instance upon the son of the woman's legitimate father, [4] and in default of him, upon the son's son. If there are no sons, the right devolves upon the woman's legitimate father ; in default of him, upon the woman's brother and his male descendants. In default of all these, it devolves upon the father's father and the younger branch of the latter's male descendants.

In default of all blood relations the powers of a *Walî* devolve upon the woman's freed slave of the first order and his male heirs. After him the right devolves upon whoever has taken care of the woman, up to her marriageable age. If there are none of the aforementioned, the right devolves naturally on the Ḳâḍi. Finally there is the general right to act as *Walî* [5] on behalf of a woman which is inherent in all Muhammadan communities.

Sub-section 7. Of the woman's consent.

A virgin's silence signifies her assent to the proposed marriage [6] ; at the same time she should be informed of the construction that will

[1] By emancipation is meant release from the power of constraint. Even though emancipated a *Walî* is always necessary to act as intermediary and in order to validate the marriage.

[2] By *orphan* is here meant that the girl has neither father nor testamentary guardian.

[3] i.e., not having the power of constraint.

[4] Perron's translation from the text must here be at fault. Both Zeys (I. p. 7) and the *Risâlah* (rule 11) give the woman's own son and then her grandson as first in the order of priority among *Walî*.

[5] The term *Walî* here used must not be confounded with the word *Wâlî* which means a ruler or governor; (cf., Hughes.)

[6] *Risâlah*, rule 6.

be put upon her silence.[1] The woman who has lost her virginity must give her assent in words.

Sub-section 8. Of a marriage contract made in the name of a woman in the absence of her father. Of the representative delegated by a woman or by a slave. Of diverse cases of nullity.

A marriage contract ratified by the Ḳâḍi or some other *Walî* shall be null and void if made whilst the bride's father (who has the right of constraint) was more than six days' march distant from the home.

A woman, being deprived of the right of acting as another woman's representative, shall commission a *Walî*, in order to conclude a marriage contract on behalf of her female slave, or on behalf of the ward whose testamentary guardian she may be, or on behalf of a slave she may have freed.[2] The same rule applies where a slave has been made the testamentary guardian of young girls.

A marriage, concluded either by a woman, her representative, or her future husband, during *iḥrâm* is null and void.

Sub-section 9. Intervention of Unbelievers and Bishops in a marriage with a non-Muhammadan woman. The husband's representative. Consideration of the woman's tastes. Of a father's ill-will.

A marriage contract concluded in the name of a Muhammadan woman shall not be valid if executed by an Unbeliever or apostate acting as *Walî*, nor will it be valid in the case of a Muhammadan *Walî* contracting a marriage on behalf of a non-Muhammadan woman uniting herself to a Believer. A marriage contract, however, made by

[1] The following form of marriage contract for a virgin is extracted from Zeys and Sidi Saïd, *Recueil d'Actes et de Jugements*, wherein the Arabic is also given.

Glory to God, the Lord of the worlds!

May blessings and salvation rest on our lord Muḥammad, the last of the prophets, the chief of God's messengers, on his family and on his companions.

The honourable Kaddur, being of age and living in Algiers, a trader by calling, son of Suleyman, has contracted a marriage by God's blessing—may He be exalted—and through His goodness and graciousness, with the noble virgin Fatima, now passed the period of puberty, eighteen years of age, daughter of Muḥammad b. Ali, weaver, domiciled in Algiers. The marriage is contracted in consideration of a dower of blessed augury amounting to thirty douros, of which half is at once due, before consummation of the marriage, and the remaining half payable within four years. The husband will only be acquitted of this debt by lawful means. The bride's father has contracted in her name, and this by virtue of the powers conferred on him by God and after obtaining her consent, expressed by silence, which is considered as the equivalent to consent. The husband has appeared in person; he has accepted the contract, the offer and the acceptance have been made as required by Law.

All that precedes has been witnessed (by the two *'udûl* of the Court), the parties to the contract having the necessary capacity as required by Law.

Done on the 24th December, 1884, corresponding to the 5th of *Rabî'ak al-Awwal*, 1302.

[2] *Risâlah*, Rule 58.

a Muhammadan on behalf of a non-Muhammadan slave he has freed is valid.

An Infidel may marry his female relative to a Muhammadan, and if she has no relations, the Bishop may act as her *Walî*.

If a Believer concludes a marriage contract on behalf of a non-Muhammadan woman with an Infidel, the fact is to be passed over in silence. The marriage, however, is illegal.

A Believer may appoint anyone he chooses as his agent to contract his marriage.

A woman's representative may only cede his right to another man who is of the same status as himself; that is, her *Walî* must be a Muhammadan, a free adult and a male.

The *Walî*, who is not the father of the woman to be married, must endeavour to find her a suitable husband, that is, one according to her taste. If the woman refuses to marry the man proposed by her representative, the decision of the Ḳâḍi is to be resorted to, and the latter will give full weight to the woman's sentiments in the matter.

If a father refuses several suitors, it is not to be concluded that he entirely refuses to give his virgin daughter in marriage; there must be proof of positive ill-will on his part. If such proof is forthcoming, the Ḳâḍi may insist on his daughter being married and may conclude her marriage, in spite of the opposition of the father.

Sub-section 10. Of circumstances in which a woman appoints one or two representatives. Of the representative, who, being the bride's relation, may contract a marriage with her on his own behalf. Of cases where two marriage contracts have been concluded for the same woman.

If a woman asks her representative to marry her to any man he likes, that man is to be accurately described to her before contracting the union; if this is not done she may retract. But conversely, where a man has appointed an agent, male or female, to ask for the hand of a certain woman, and the marriage contract has thereupon been made, he is bound to accept it. For should the woman not please the husband, he may part from her when he chooses; a wife has not that right.

A man may personally conclude a marriage contract with a relative by saying: 'I ask thee to be my wife, in return for such and such a dower,' provided that, in the presence of witnesses, the woman has previously consented to marry him. Here, proposer and accepter[1] are merged in one person.

The Sovereign is to decide in those cases where relatives of the same degree and having equal representative rights, differ as to the

[1] i.e., the woman's male relative who is proposing may also act as her *Walî* and accept his own proposal.

choice of the woman's representative and as to her future husband.

If a woman allows two representatives to find her a husband and each has independently of the other concluded a marriage contract with a man, the first contract made in point of time shall have priority, provided the second suitor, and he who made the contract, were unaware that there was a previous contract, and provided the second suitor has not been on intimate terms with the woman. If, however, the second suitor has been on intimate terms with the woman, not knowing of the first suitor, the woman shall marry him. But he shall lose this right, and the marriage be null and void, if he has been on intimate terms with the woman during the period of the *'iddah*. In this case the first contract shall be valid. If it is not possible to ascertain which contract was first concluded, both contracts are null and void. The opinion of jurists differs considerably with regard to the right of succession in the case where a woman dies without it being ascertained which of the two men was her lawful husband. The majority appear to be of opinion that neither of the two husbands have any rights to the woman's estate.

Section III

Of Nullity of Marriage

Sub-section 1. Of secret marriages. Of certain causes of nullity. Of marriages which have given rise to differences of opinion as to their validity. Consequences of a marriage which has been annulled before or after consummation.

If either party to a marriage contract has insisted on keeping their marriage secret, such marriage shall be annulled by judicial decree. If, however, the marriage has been consummated and has been in force for a long period, it shall not be annulled.

Again, a marriage shall be annulled ; before, however, cohabitation has taken place ; if the dower is of an unclean nature ; e.g. where wine or pigs, etc., have been given.

Generally speaking, in all cases where the marriage contract contains any stipulations in opposition to the real purpose and institutions of marriage, the contract shall be considered null and void.

A marriage which is contracted for a certain time only, *mut'ah*, shall be annulled by judicial decree, whether cohabitation has taken place or not. No repudiation is necessary : the marriage is, *ipso facto*, void. The same applies to a marriage based on hire, *muwakkat*. Neither of these marriages requires to be annulled if the husband in no way betrays his intentions.

A marriage contract, which stipulates that the husband shall cohabit with his wife only after a fixed time, is also void.

A controverted marriage is one the validity or invalidity of which

has given rise to differences of opinion. The judicial annulment of such a controverted marriage necessarily implies repudiation. Such are :—a marriage concluded whilst one of the two parties or the woman's representative has assumed *ihrâm* in view of the pilgrimage or the *'umrah* ; or a marriage based on reciprocal payment or acquittance of dower.

It is only the fact of a marriage having been consummated, or dalliance having taken place, and not the fact of the marriage contract by which a man marries, for example, a fifth wife, that prohibits him from marrying his fifth wife's mother or any other of her relations within the prohibited degree.

If a marriage be annulled after it has been consummated, the husband shall, nevertheless, deliver the dower stipulated for in the contract ; or if nothing was stipulated, then the customary dower is to be given. This is also the case where the dower consists of objects which the Law condemns. If, however, the marriage was annulled prior to its consummation, no dower need be delivered to the woman. The result will be identical (i.e. no dower is due) if the husband dies before the marriage has been consummated.[1]

If, in the case where the marriage is annulled prior to its consummation, the dower should have been below the legal minimum, then half of that amount shall under all circumstances be given to the woman. The legal minimum is three *drachma* or a quarter of a *dînâr*.

Sub-section 2. Annulment of the marriage of young boys and slaves. Of the maintenance of a slave's wife given in marriage by his master.

If a boy under the age of puberty, of normal disposition, concludes a marriage contract without his guardian's consent, the latter has the option of having the marriage annulled by judicial decree, or of allowing it to subsist. The girl has no claim on the dower, nor need she go into *'iddah*, unless the boy dies prior to annulment.

If a young boy's marriage contract should have been concluded under onerous conditions, he may, on reaching the age of puberty, repudiate the woman.

A master has the discretionary power of annulling the marriage contract of his male slave, whether he be a *kitâbah* slave or not, if the latter has concluded a marriage without his master's consent ; the slave cannot reconstitute that union. If a female slave marries without her master's consent, the master has no option, but is bound to annul the marriage.

If the slave be sold, the master's right is extinguished ; the new owner is, however, to be informed of the slave's marriage. If he keeps the slave, the marriage must be maintained.

[1] But according to the *Tuḥfat*, rule 393, this point is controverted.

After the annulment of a slave's marriage by his master, the woman is entitled to receive from the slave a quarter of a *dînâr*, provided cohabitation has taken place. She must return anything she has received over that sum.

An ordinary slave and a slave under a *tadbîr* declaration become, when once enfranchised, debtors of the amount still owing of the dower to their respective wives, unless they are discharged of that debt by their master or the Sovereign, prior to being enfranchised.

Only the *kitâbah* slave and the slave who has been allowed by his master to trade with his own savings, are allowed to keep a concubine without their master's consent. The concubine can only be bought out of monies which the slave possesses by way of a gift or legacy, and not out of profits made in commerce. The master may, however, authorize the purchase of a slave concubine at his own expense, or may lend money for the purpose.

A slave's wife may not be maintained by her slave husband out of savings that properly belong to his master, unless there be a local custom to that effect.

A master is in no way responsible either for the food or dower or maintenance of his slave's wife, unless he has undertaken to bear these expenses.

Sub-section 3. Three cases in which marriage can be insisted upon. Contestations between father and son re the payment of dower. Of the case where one of the parties denies having given his consent or his authorization.

Sub-section 4. Of the guaranty of the payment of the dower by a third person.

Sub-section 5. Of marriages which are well suited in the eye of the Law.

The contracting parties to a marriage must be suited to each other in respect of their piety, religion and morality.

Where a woman's representative has consented to an ill-suited marriage, and the woman has subsequently been repudiated, such representative shall not have the right to oppose the remarriage of the two parties (after the expiration of the *'iddah*), provided there be no other cause to prevent the second union.

There are conflicting views as to how far the bride's mother may oppose an union she disagrees with. Apparently she may object only on the grounds that the suitor is too poor or suffers from an incurable disease.

The parties are suitably matched in the eyes of the Law where one who has been freed for a considerable time marries an Arab woman; or where a Believer of humble birth marries a woman of higher condition. Opinions differ as to marriage between a slave and a free woman.

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Sub-section 6. Of illegal unions.[1] Circumstances which render a marriage illegal with regard to the number of wives and to the degree of affinity.

No Muhammadan man or woman may marry one of his direct ascendants or descendants. Moreover, an illegitimate son may not marry his father's legitimate daughter.

No Muhammadan nor his male descendants may marry a woman once married to his father or grandfather, and similarly no woman may marry the man once her mother's or one of her mother's daughters' husbands. No one may marry the children or grandchildren of his father or mother.

A Muhammadan may not be married to five wives at the same time. If there has been one marriage contract for all five, the marriage of all five shall be annulled ; if there were several contracts, the fifth only shall be annulled.

A slave may also marry as many as four wives.

A man cannot be married at one and the same time to two sisters ; but on the death or repudiation of one, he may marry the other.[2] The same rule applies to concubines.[3]

Sub-section 7. Of illicit unions with female slaves.

A Believer may not marry a near relation, sister, aunt, etc., of his female slave, with whom he has had sexual relations, until he has abandoned all his rights over that slave by enfranchising her ; or as soon as he has lawfully married the said slave to another ; or has sold her ; or if she has been taken by the enemy ; or if she has run away without hope of returning.

Sub-section 8. Of the remarriage of a woman with the husband who has irrevocably repudiated her.[4]

If there has been an irrevocable repudiation,[5] that is, a triple one in the case of a freeman and a double one in the case of a Muhammadan slave, the husband cannot conclude a new matrimonial union with the repudiated wife until after consummation of marriage with another Muhammadan who is over the age of puberty.

[1] *Risâlah*, rules 29–38, 40.

[2] ' Khalîl lays it down generally : it is unlawful to bring together two women so related to one another that, were one of them supposed to be a male, marriage between them would be unlawful.' (*Risâlah*, note 35.)

[3] A man may have as many concubine slaves as he chooses in addition to four wives.

[4] Cf., *Risâlah*, rule 65.

[5] An irrevocable repudiation may be of two sorts : the one *bâ'in* which does not necessitate a consummated remarriage on the part of the woman with a third party before the first husband can remarry her, and *batt* which does necessitate such a marriage. See pp. 127–132.

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Sub-section 9. Of the prohibition of marriage in the case where either of the contracting parties is the property of the other. Of cases in which a slave necessarily becomes the property of him who has had intercourse with her.

A Muhammadan (man or woman) is prohibited from marrying: a slave (male or female) of any grade, where such slave is his or her actual property; or a slave of one of his or her children.[1] Such a marriage must immediately be annulled, whether it has been consummated or not. No repudiation is necessary.

Again, the marriage of any Muhammadan woman (free or slave) shall be annulled if she has any proprietary rights over her husband. If the master of the slave husband enfranchises him without the wife soliciting it, the marriage remains valid. If the woman was of free condition, she will have a right of succession and patronage over her husband.

If a female slave buys a husband without her master's permission and the master annuls the bargain, the marriage shall nevertheless subsist. The sale being incomplete, the woman's husband is not her actual property; if the purchase had been sanctioned, the marriage would be null and void.

A father shall become the owner of his son's (or daughter's) female slave from the fact of his having had sexual relations with her, but he has to pay his son or daughter the price the slave was worth when he cohabited with her. If the intercourse with the father is not followed by pregnancy, the slave must be sold. If the father is unable to pay for the slave, the son or daughter may retain possession of her. If the slave becomes pregnant, she will not be sold, but will live with the father under the name of 'mother of offspring'[2], that is, a woman to be enfranchised owing to her motherhood; but the father may only resume cohabitation with her after a period of purification.

If both father and son should have had sexual intercourse with a slave in their actual possession, neither of them shall ever cohabit with her again. Each has made such cohabitation illegal for the other. Moreover the slave shall be liberated "on account of her motherhood" on the death of him who was the cause of her pregnancy.

Section IV

Of Marriages which are Permitted between Parties of different condition, either Slaves or Free Men

A slave, even one under a *kitâbah* declaration,[3] may marry his

[1] The slave must first be enfranchised.

[2] Or *umm walad*. A *ḥadîth* says: when a slave girl has a child by her master, she is free at his death.

It is commendable for the father to free the slave mother and to marry her himself or to marry her to another, should it be her wish. (Lane, I., p. 128.)

[3] *Kitâbah* lit. means writing, i.e., a bond of freedom in return for money paid. The slave is *mukâtib* until the ransom is fully paid.

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master's daughter, with the consent of master and daughter. On the death of the slave's master, however, the marriage is dissolved. This would also be the case where a son marries his father's female slave under a *kitâbah* declaration, or where a male slave under a *kitâbah* declaration marries his master's daughter.

A slave may also become the husband of a slave belonging to another master, subject to the one condition that she be a Muhammadan ;[1] the children are always born slaves.

Again it is permissible for a free Muhammadan, deprived of the possibility of propagating his own race, for example an old man, or an entire eunuch, to marry his slave, since there is no danger of slave-children being born. The owner of the slave must however be a free man. Were he a slave and the slave's husband was free, the marriage would not be permitted, since the children would be the slaves of the first owner, i.e. of the owner of the slave who owns the female slave. On the other hand, if the suitor, who is a free man, is capable of having children, and if the female slave belongs to an individual who is not likely to enfranchise the children, then the marriage is allowed only under the following conditions : that the slave woman is a Believer, that there is danger of the suitor indulging in debauchery, or that he cannot afford to marry a free woman and maintain her. In these cases the free man may marry the female slave even though he already has a wife of free condition, provided the free wife consents to this marriage with a slave.[2]

Section V

Of Things that are Permitted to Eunuchs and Slaves with respect to their Mistresses

Section VI

Of a Wife's option to adhere to or break a Marriage Contract in cases where her Husband is already married to a Slave

A free woman who marries a free man, without having been informed that her husband was already lawfully married to a slave, shall have the choice : either of remaining and accepting the position, or of demanding a separation by means of a complete repudiation. The free wife may also exercise this right of option : (*a*) where her husband subsequently marries a slave, even though she may not have opposed the marriage, or (*b*) where she has consented to his marrying one slave and he marries a second, or (*c*) where the free woman knew of his marriage to one or two slaves, and subsequently discovers that he already has three slave wives.

[1] And has her master's consent ; see p. 97.

[2] In practice any free man may marry another's slave, but the children of this union are not his, but are the slaves of the owner of the slave-wife. Hence the class known in Hausa as *bachucheni* and in Fulani as *dimago*.

Section VII

Of Rights which a Master retains and those that become extinguished on his giving his Slave in marriage. Cases where Marriage is null and void. Permission to avoid conception. Prohibition to procure Abortion

A female slave, except she who is *umm walad* or under a *kitâbah* declaration, shall not, after having been given in marriage by her master, leave his home ; unless it was so stipulated or unless it is the local custom for her to do so, for her master retains his right over her with regard to domestic services. If the woman is an *umm walad* or under a *kitâbah* declaration, she has the right to leave her master's house after her marriage ; she is free from all domestic services due to her master. If she has remained in her master's house, and unless there be a local custom to the contrary, a master who has given his slave in marriage may travel with her or sell her to another about to leave the country.

A master who gives his female slave in marriage may : (*a*) retain the whole of the dower, except a quarter of a *dînâr* ; (*b*) oppose any sexual relations between husband and wife until he has received the dower ; (*c*) take the whole of the dower, even should he kill his slave, either before or after the consummation of the marriage, or should he have sold her to a stranger going abroad. But should the woman be repudiated by her husband, prior to the consummation of the marriage, the master shall be entitled to only half the dower. If the repudiated slave wife is sold to a brutal and wicked individual or if she has run away and cannot be found, then the husband need give no dower.

There is considerable divergence of opinion as to whether the dower is to be applied by the master to the purchase of a marriage outfit for the slave.

If the slave is sold before cohabitation has taken place, the master's right to prohibit sexual relations until the dower has been delivered is extinguished ; neither shall that right vest in the buyer.

If a slave has been freed by her master upon condition that she shall marry him or another man, she is not obliged to keep her promise once she is free. Whilst she was a slave she had no right to give an undertaking ; free, she is at liberty to dispose of her person as she chooses. This, however, would not be the case if she had been promised her freedom upon condition that she would embrace Islâm.

If a married slave is sold to the husband himself, but prior to the consummation of the marriage, the vendor is only entitled to receive half the dower.

According to the majority of jurists, this also applies to the case where the master is obliged to sell the slave ; for example, in the case of his bankruptcy.

If the sale takes place after the consummation of the marriage, the master is entitled to receive the whole of the dower.

When a man concludes by one and the same contract a marriage with a free woman and also with a slave, the marriage with the free woman alone is lawful.

The husband of a slave wife may, with his wife's and her master's consent, take preventive measures against conception. The same permission is given to the husband of a free woman, provided she consents.

It is forbidden for a woman to attempt in any way to procure abortion, even though the husband should consent to it. The same applies in cases where pregnancy is the result of illicit intercourse.

Section VIII

Of Marriage with Infidels [1]

Sub-section 1. Marriage of tributary and non-tributary subjects prior to their conversion to Islâm. Of a Muhammadan's marriage with an Infidel woman.

The general rule is that a Muhammadan shall neither cohabit with nor marry an Unbeliever. According to Mâlik, it is blameable, though not unlawful, if the woman be free, Christian or Jew.[2] It is still more blameable if the woman is living in *Dâr al-ḥarb*. The Law considers such an union *makrûh*, because a non-Muhammadan woman drinks wine and other intoxicating liquors which are also imbibed by the child in her womb; because the Believer kisses such a woman and sleeps with her. Moreover, the Believer has not the right to put a stop to those habits that his wife has contracted; he cannot prevent her from going to church; and, in the event of her dying in pregnancy, she and the child in her womb will be buried in the cemetery of the Infidels, a very hole of holes in hell.

If an Infidel married to an Unbelieving but free woman embraces Islâm, he shall be allowed to live with her in order to effect her conversion to Islâm. Such a marriage is, however, null and void; since it is a primary condition of a valid marriage that the husband shall be a Muhammadan at the time the marriage was concluded.

[1] Cf., *Risâlah*, rule 39, which runs: 'God has forbidden intercourse with unbelieving women: but marriage with a scriptural woman is permitted.' This is probably a counsel of perfection as regards all intercourse, for nowhere does the Law prohibit intercourse between a Muhammadan master and his pagan slave. It is not unlikely that such sexual relations *de facto* admit the woman within the pale of Islâm. But marriage on the part of a Muslim with an unconverted pagan woman is certainly unlawful.

[2] i.e., a *Kitâbiyah*, 'or woman of the Book,' 'scriptural woman.' A *Kitâbi* is not allowed to have a Muhammadan woman as his concubine. (Lane, I. p. 128.)

Christians are generally referred to as *Naṣârâ* or Nazarenes. Christians call themselves *'Isawî* or *Masîḥî*. (Hughes, p. 431.) In Hausaland Christians call themselves *Mai-bi* (Issa), followers (of Jesus).

Sub-section 2. Of those unions that are voided by the husband's conversion to Islâm.[1] Of the wife's right of succession on the husband's death.

Section IX

Of the Marriage of Individuals who are sick [2]

The generally received opinion is that a person who is seriously ill is not permitted to marry.

Section X

Of the Option to maintain or dissolve a Marriage

Sub-section 1. Of the option in general.

The right of option, as to whether a marriage shall be maintained or dissolved, may be exercised: (*a*) if one of the contracting parties was unaware of the defects of the other; or (*b*) if aware of them had not waived them, and that no intercourse had taken place.

He who denies the other's assertions brought forward to establish one of the afore-mentioned conditions, shall swear to his assertion. If he makes oath he will be allowed to maintain his option.

Sub-section 2. Of material reasons which allow the option to be exercised.[3]

Sexual incapacity or deformity and certain diseases, such as madness, leprosy, elephantiasis, permit of the option to maintain or dissolve the marriage being exercised on the part of either husband or wife.

Any defect under the above category must have existed before the marriage was concluded, except in the case of madness, leprosy or other repugnant diseases. The wife may in this latter case exercise her option even after consummation of the marriage.

The right of option may also be exercised where either party married the other believing him or her to be free, and he or she proved to be a slave.

Sub-section 3. Of cases in which the option may be exercised after a delay. Of certain special circumstances peculiar to the wife and the treatment of certain diseases of the genitals. Verifications. Declarations which are always accepted.

[1] For the converse, see Chap. XLII, on Apostasy.

[2] Cf., *Risâlah*, rules 61–64.

[3] Under this sub-section Khalîl lays down that the castration of animals, whose flesh is not forbidden, is permitted, for castration improves the meat; the gelding of mules and donkeys is also permitted, for these animals only indirectly serve the needs of warfare. But, according to the Prophet, the gelding of horses is forbidden, except such as are very restive. Finally, according to the consensus of opinion, the castration of man is forbidden in Islâm.

An impotent husband is to be allowed one year in which to undergo a treatment. If, after the expiration of that year, he is still impotent, the wife may cause the marriage to be annulled. The wife shall be entitled, after that delay, to the whole of her dower.

A woman whose genitals are abnormal may also undergo a treatment at the hands of a gynecologist; the husband must pay for the treatment.

If a father knew that his daughter had accidentally lost the essential characteristics of virginity, and neglects to inform his daughter's husband of this, then the husband shall be entitled to break the marriage contract. This opinion of the jurist (Al-Aṣḥâb) differs from that of the principal commentators of the *Mudawwanah*.

Sub-section 4. Dispositions concerning the dower in case the option is exercised and the marriage contract broken.

If the marriage is dissolved after conjugal relations have taken place, the husband's defect being the cause of the rupture, the wife is entitled to her dower. If the wife's defect is the cause of the rupture, she is nevertheless entitled to the whole dower; but the husband shall be reimbursed by her representative who knew of the woman's defect or infirmity which was the cause of the rejection.

Where the woman's representative has concluded the marriage contract in the presence of the woman, and where both have abstained from informing the husband of the woman's defect or infirmity, the husband may claim the whole value of the dower either from the woman herself or from her representative.

Sub-section 5. Consequences of the dissolution of a marriage, when the husband discovers that his wife is not a free woman, or that she is pregnant, or that there are children.

The child born to a free father, who did not know until after consummation of the marriage that his wife was a slave, is free also. If the husband was not deceived by the wife herself, she will receive the whole of the dower on his leaving her. In this case the husband is indebted to the woman's master for the value of the children. He need not give up any property that may belong to them, since on their father's side they are virtually free, whilst on their mothers' side they are the slaves of their mother's master.

If the woman slave belongs to one of the husband's ascendants or descendants, he need not reimburse the value of the children.

If the child dies before the marriage is recognised as being fraudulent, the father owes nothing to the master for that child.

If the father is unable to pay the master the value of the child, the master takes the child to cover the debt.

Sub-section 6. Exercise of the option after repudiation or after death. Faults which need not be disclosed in a woman. The leper is to be prevented from cohabiting. Exercise of the option by Arab women.

If, after repudiation of the wife or death of either or both parties, the husband discovers something which under ordinary circumstances would entitle him or her to revoke the marriage contract, this right of revoking shall be ignored. The husband shall pay either half or the whole of the dower, according to whether the marriage was consummated or not. Unless the suitor has definitely stipulated that the woman is to be exempt from any infirmity, the *Walî* need not declare, for example, that the woman is blind.

When a man is in an advanced state of leprosy he should be prevented from cohabiting with his slave wives, and still more so with his free wives.

A woman of pure Arab origin has the right to annul her marriage with a freed slave who has falsely declared himself to be an Arab.

Sub-section 7. Of the option to be exercised by a woman who is freed after her marriage.

A female slave may, as soon as she is freed, exercise her option of freeing herself from the slave she may be married to, either by one absolute repudiation, or by two repudiations.

If the female slave's master has received the dower prior to her manumission and is unable to return it, the woman remains the wife of her slave husband.

A freed female slave may no longer annul her union with a slave, if she explicitly renounces her right to do so.

Section XI

Of Dower (*Ṣadâḳ*)

Sub-section 1. Of the character and nature of dower.

Dower is analogous to a sale price, that is, dower comprises the same fundamental conditions as those attached to a sale. When a woman marries, she sells a part of her person. In the market one buys merchandise, in marriage the husband buys the *genitale arvum mulieris*. As in any other bargain and sale, only useful and ritually clean objects may be given in dower. For example, a slave may be given as dower, and the bride, not the bridegroom, has the choice of the slave.

Questions of warranty or responsibility concerning a dower are governed by the same principles as those applying to sales.

Depreciation or loss of the dower is to the detriment of that party who had charge of it at the time when the said depreciation or loss occurred; the same principle applies to optional purchases in general.

There is a further analogy between a dower and a concluded bargain and sale in the following cases :—

(1) Where some claim or objection is raised with regard to the whole or part of the dower ;—or

(2) Where, after a more or less considerable lapse of time, the whole or part of the goods given are tainted with some vice or defect. Thus, where a third individual claims the dower accorded to a woman, she can demand in lieu thereof the exact equivalent ; the said claim, however, shall not annul the marriage. Similarly, in the case of a sale, a claim must also be satisfied ; generally, however, such a claim annuls the sale.

With regard to the goods constituting the dower, which are subsequently found to be bad or defective, the wife has the option either to keep them as they are, or to return them and claim the equivalent value, or to demand that they shall be replaced by other goods of the same kind.

Domestic animals may be given in dower ; for example, a certain number of camels, or goats, or sheep or oxen, or slaves. But it is forbidden to give trees, or a house, which one proposes to build, unless these things are upon land which the suitor actually possesses ; moreover, these things and their site must be accurately defined.

A marriage contract may also be stipulated for in return for customary dower ; that is, dower suitable to the social standing, birth, beauty, or youth of the woman.

There are two conflicting opinions as to whether it is necessary to describe exactly the kind of slave it is intended to give as dower.

If the sort of slaves has not been specially designated in the contract, only female slaves shall be given in payment of the dower.

The husband may stipulate that the dower agreed upon shall only be delivered when he is about to enjoy his conjugal rights.

The payment of the dower, in part or wholly, may be deferred until the husband finds himself in the pecuniary position to do so ; provided he be comfortably off, and provided there is reasonable hope that his position will improve.

It is permitted to stipulate that the dower shall consist in giving a slave to some other individual, (i.e. no direct payment to the wife) ; or again, that the dower shall consist in the enfranchisement of the father or brother or child of the wife, who shall then have hereditary and all other rights which a patron retains over the slave whom he has freed.

Sub-section 2. Of the payment of dower. Of circumstances under which consummation of marriage may be deferred. Circumstances that involve either the total or partial payment of the dower.

Canon Law demands that dower once determined shall be de-

livered to the wife as soon as possible, notwithstanding the fact that no consummation can take place owing to the youth of either or both parties.

Where the dower is not exactly determined, the wife may, until the husband has paid the dower, refuse either to see him privately, or to consummate the marriage, or to travel with him.

A wife may not refuse to cohabit with her husband if she has once allowed him to consummate the marriage, unless there should be a claim by a third party on some part of the dower. This right of refusal however ceases, once the husband has refunded the part that was claimed.

Under the following conditions only, the parents of a bride may stipulate for a delay of one year or less from the date of the conclusion of the contract, before consummation takes place: (*a*) where the husband intends to take his wife to distant lands, or (*b*) where the bride is very young, though nubile. Under no circumstances can more than one year be stipulated for.

Consummation of the marriage may also be deferred owing to the ill-health of the bride, or again, owing to the necessity of preparing a marriage outfit as befits the bride's social position.

Where a husband declares without proof that he is unable to afford the payment of the dower stipulated for, the judicial authorities shall give him three weeks in which to prove his impecuniosity. This delay of three weeks shall not be granted unless the husband produces some one to go bail for him; if he cannot do so he shall be imprisoned like any other debtor. If it be proved that the husband cannot afford to pay, the Ḳâḍi shall have power to fix another delay within which he can reasonably be expected to furnish the stipulated dower. If, however, it is shown that he is in a position to pay, he shall be obliged to do so at once, and to consummate the marriage.

In case of the absolute impossibility of the husband being able to pay the dower, the marriage shall be dissolved by repudiation. In this case the husband shall give the wife half the stipulated dower, if the marriage was not consummated.

The wife has no claim at all on the dower, where either party has annulled the marriage before consummation, on account of some defect or infirmity in the other.

The integral payment of the dower by the husband becomes obligatory: (*a*) if one or both parties die; (*b*) if the marriage has been consummated; (*c*) where the wife has lived for one year in her husband's house, even though intercourse may not have taken place.

Sub-section 3. Of the amount or form of dower that renders a marriage null and void. Of certain promises that are not necessarily of an obligatory nature. Loss, etc., of the dower. Of contracts made collectively.

If the dower is below the value of the legal minimum, that is, less than one quarter of a *dînâr* or three *drachma*,[1] the marriage is null and void.

The marriage is also void if not consummated, where the dower comprises things forbidden by law, e.g., wine, etc., or where it was stipulated that there should be no dower,—or again where it was stipulated that the husband should perform some act in lieu of dower. In short, dower must be composed of things which are of material advantage to the wife.

The following stipulations also render a marriage null and void, if not consummated :—that the dower is to be paid at an unknown date, e.g. at somebody's death, or at an altogether undeterminable date, or at an exaggeratedly distant date, e.g., fifty years hence, or again, if the dower comprises land in a distant country.

A marriage, if not consummated, shall be null and void should the dower be composed of things which, to the knowledge of both parties, have been acquired by violence ; or if the stipulations are in the nature of a commercial association. If the marriage was consummated, it shall be maintained subject to the payment of local customary dower.

According to the *Mudawwanah*, Mâlik disapproves of a marriage with two or more women by means of one contract, and in which each woman's dower is not clearly defined.

If the dower was fixed at a thousand *drachma*, with an additional stipulation that if, for example, the husband takes his wife to a distant country he shall pay another thousand, that stipulation shall not be considered as being absolutely obligatory, but it is just and right to adhere to it. It is blameable to make such conditions and, when once made, to ignore them.

Sub-section 4. Of circumstances that invalidate or modify a dower. Of marriages of privation.

If such an additional stipulation, as mentioned in the above sub-section is made, and the wife renounces the additional dower on condition that the husband should not take her away or take to himself another wife or a concubine, after the stipulations of the contract itself have been accepted ; and if, subsequently, the husband breaks his word ; then the wife shall be entitled to demand that part of the dower she had waived, provided she has not caused her husband to bind himself by an oath in any other way. For in this case, the husband would only be bound by his oath and nothing else.

If, for instance, a man says to another :—'Give me thy sister as a wife in return for a dower of one hundred *drachma*, and I promise thee my sister or daughter as wife for one hundred *drachma*,' such

[1] i.e., 1*s*. 6*d*. of our money.

a proposal would mean a marriage of privation and is null and void.

A marriage contract concluded by a master with his slave, upon condition that some or all the children shall be free, is always null and void ; for such a contract would amount to trading in children before they were born.

Sub-section 5. Consequences of a doubtfully and inaccurately determined dower.

Sub-section 6. Of marriage by delegation, *taʿwîḍ*, i.e., a marriage contract made without precisely determining the amount of the dower. Of a marriage where the dower is to be subsequently determined, *taḥkîm*.[1]

The law permits a marriage-contract to be made either without precisely stating the dower or by postponing the determination of the amount to a later date.

Where no stipulation as to the dower is contained in a marriage contract, the wife may not demand the customary dower until after consummation of the marriage.

The right is extinguished if the husband or wife dies, or if the husband repudiates the wife prior to consummation.

In the case of a *taʿwîḍ* marriage the wife should not allow the husband to have any intercourse with her until the amount of the dower is definitely determined ; it is even blameable for her to accede to his desire.

If a marriage is concluded without stipulations as to the dower, or if it is left in the hands of the husband, the wife shall be obliged to maintain the marriage ; that is, to accept the dower furnished by the husband, provided its value is not below that of the customary dower.

A woman who is emancipated may accept a dower which is inferior to the customary one, and so may a father in the name of his daughter under his authority, whether the marriage was consummated or not. A guardian, however, may only accept such a reduced dower on behalf of his ward if the marriage has not been consummated.

A virgin, free from all authority, that is, without father, paternal guardian, or guardian designated by the Ḳâḍi, shall not accept a dower which is below the customary one.

If a husband has made a *taʿwîḍ* marriage contract, consummation not having taken place, and designates the dower during an illness of which he dies, such a designation does not make the dower obligatory; it is merely a testamentary disposition left to the discretion of the heirs, who may, if they choose, execute it by way of simple donation or present.

[1] Cf., *Risâlaḥ*, rules 44-48.

Sub-section 7. Of customary dower.[1]

Sub-section 8. Of certain conditions in a marriage-contract made in favour of the wife.

A husband may consent to certain conditions being made in favour of the wife, provided these conditions can be legally and rationally accepted; e.g. the wife may be permitted to entertain certain family relations, or wear certain clothes.

A man who accepts as a condition that he shall abstain from any sexual intercourse, either with the slave who has borne him a child, or with a concubine, is obliged to adhere to the condition accepted; otherwise he must pay the forfeit, e.g. repudiate his wife, or allow her to demand separation if she wishes.

The wife is entitled to exercise this right, although the nature of the forfeit has not previously been agreed upon or accepted by the husband.

Sub-section 9. Of circumstances under which half the dower is withdrawn from the wife.

There are different opinions as to whether a wife, after the conclusion of a marriage-contract, has an absolute right over one half of the dower and the profits yielded therefrom; or whether this first half is to be enjoyed by both parties jointly; and whether in the case of losses being sustained on that first half, they are to be borne by both parties or one only.

One view is that the conclusion of the contract gives the wife no proprietary rights at all; another view is that the conclusion of the contract involves the immediate delivery of half the dower, and that the accruing profits and losses are to the benefit and detriment of both parties, provided repudiation takes place before the parties have cohabited.

If the wife is repudiated prior to actual cohabitation, she shall return half the value of the dower, whether she has given away the objects which constituted the dower, or whether, in the case of a slave having been given in dower, she has freed the slave.

If she has disposed of the objects by sale, she shall return to the husband half the sale price.

Sub-section 10. Of the apportionment of the dower. Of presents and expenses of the wedding feast, etc., in the case of anticipatory repudiation, i.e. a repudiation effected before cohabitation has taken place.

[1] Customary dower is that amount that is proposed to a suitor, and is the expression of the local value attaching to the bride with reference to her religious worth, her beauty and the renown of her family, and varies, moreover, according to the wealth of the country. The amount may also be determined by what the bride's sisters have already received in dower, conditions being equal.

If a husband repudiates his wife prior to cohabitation, the dower is to be divided equally between husband and wife. Any surplus of the dower given by the husband after the conclusion of the marriage contract or any presents made by the husband prior to the contract, but in view of same, shall also be divided between the two parties.

Any loss or depreciation of the dower shall be borne equally by both parties, provided such loss can be proved; if no proof is forthcoming as to what happened to the goods, he who was in charge of them is responsible to the other for such loss.

The goods bought by the wife as the marriage outfit are also to be equally divided *in natura*.

Whichever of the two parties had charge of the dower shall, in case of anticipatory repudiation, be entitled to demand from the other reimbursement of half the expenses incurred in keeping the dower.

Sub-section 11. Of expenses incurred for the transport of the wife into the country where the marriage is to be consummated. Of certain uses to which the dower may be put. Of the restitution of certain expenses incurred on account of the dower.

If the consummation of the marriage is to take place in a distant country, the transport expenses of the wife and her outfit must be borne by her representative, provided she is not emancipated, otherwise she will personally have to incur such expenses.

The husband may insist upon his wife spending the portion she has received of her dower in the purchase of a marriage outfit befitting the station in life of the parties.

The father of a bride may sell the goods which constitute her dower in order to buy the necessary marriage outfit with the proceeds of the sale.

Sub-section 12. Of the right of property in a marriage outfit. Of cases in which a wife herself furnishes or gives up her dower. Of a wife's right to the dower in case of repudiation or divorce.

A father who has procured a marriage outfit for his daughter by means of a loan, may, within a year of the marriage, legally claim back the objects thus left, provided that he swears that his claim is true.

If the father puts in his claim after the lapse of one year, and cannot prove that certain things were lent by him to his daughter in order to complete the marriage outfit, his claim shall be of no avail. If the daughter recognizes this claim brought forward by her father she need only satisfy it to the extent of the third she personally possesses. If the claim exceeds that disposable third, her husband may either refuse to entertain the claim, or refuse to return anything over and above the third.

A wife who is no longer under her father's authority may, prior to the consummation of the marriage, either abandon part or whole

of her dower to her husband; or she may, by means of a present, enable him to give her a suitable dower.

The husband shall, however, prior to cohabitation, pay out of his own means the legal minimum dower, that is, a quarter of a *dînar* or three *drachma*. He need pay nothing, however, if he repudiates his wife before cohabitation.

If the wife abandons part or whole of the dower after consummation of the marriage, then, if she is subsequently repudiated, she has no claim whatsoever on the dower she has abandoned, unless there be some special stipulation to the contrary in the marriage contract.

If, in the above case, the wife was still under her father's authority (unemancipated), the marriage shall also be maintained, but the husband shall return to his wife the value of the amount she gave him in advance; moreover, if the amount advanced was below the value of the customary dower, the husband will have to complete it to the full amount.

If the wife has given away to a third person part or whole of her dower, the latter shall in no way be responsible for what he has received, where subsequently the wife is repudiated prior to cohabitation; unless he knew that the present made to him had constituted part of the dower. In this case, he shall only be obliged to return half of what he had received.

Sub-section 13. Of the apportionment of dower in case of anticipatory repudiation, where a slave constitutes the dower. Of damage caused by such a slave.

In the case of an anticipatory repudiation, the husband is entitled to claim from his wife half the value of the dower, where such dower consisted in the enfranchisement of one of his wife's slave relations.

Sub-section 14. Of the relinquishment of part of the dower. Of persons entitled to receive the dower.

The father of a virgin, or of a young woman not yet emancipated, though no longer virgin, may remit one half of the dower, provided it is done prior to cohabitation, and after repudiation has been effected. Once the marriage is consummated this right is extinguished, since the wife is then sole mistress of her dower.

Where a daughter is still under her father's authority, the latter receives the dower. The same rule applies to a testamentary guardian, and also to the master of a female slave.

If a husband, having delivered the dower to the woman's father or representative, repudiates her, prior to cohabitation; and if he who was legally entitled to receive the dower declares that it was lost, the husband may demand the reimbursement of one half the dower out of the wife's property, provided she was not in financial

difficulties at the time the dower was delivered ; otherwise the husband has no claim.

The person who has lawfully received dower in the name of an emancipated woman, mistress of her actions, and has spent it on the purchase of a suitable marriage outfit is discharged from all responsibility towards the husband if it can be legally proved: either that the outfit was delivered to the wife, or that it was brought into the dwelling-house in which the marriage was consummated, or that it was sent to the husband's house. The husband's denial is of no avail. If the woman is still under her father's authority, he who has received the dower and has given it to the bride, is held responsible towards the husband.

A woman who is no longer under her father's authority and has no guardian, and is mistress of her actions, shall always personally receive her dower.

Where a representative receives the dower granted to the wife without being legally entitled to do so, and the said dower disappears, the wife may sue the husband or the *Walî* for its value. If the husband indemnifies his wife, he may in his turn sue the *Walî*.

Section XII

Of Contentions Concerning Marriage

Sub-section 1. Contentions as to the validity of a marriage. Heredity. Recognition of a marriage concluded in a foreign country.

Where the validity of a marriage is contested by either husband or wife, their union shall only be maintained if the marriage is positively proved by producing the marriage contract, for instance, or by common report, where the noise of the festivities has caused the marriage to be publicly known. Testimony must, however, be furnished by trustworthy witnesses.

Where a widow declares herself to have been the wife of an individual now deceased and her assertions are supported by a witness, both she and her witness shall have to swear that they are speaking the truth, in order to establish her right to her late husband's succession. The same rule applies to a Believer whose wife has died.

If an individual claims to be married to a woman now living as the wife of another man, and the plaintiff has one witness to support his claim, the second husband shall be obliged to sever all connection with the said woman, pending the arrival of a second witness. If the latter corroborates the first witness's testimony, the woman is to be separated from the second husband, and shall, after the expiration of the *'iddah*, be returned to her former husband. Should there be no second witness forthcoming, or should he be too far away, then

the woman remains the wife of the man she is actually living with; and no oath is required to oppose the testimony of the first witness.

The Court may constrain a woman to postpone the execution of a proposed marriage contract, if anyone contends that she is already married to him, provided the proof of his assertions be forthcoming within a short delay; if the assertion cannot be proved within a fixed time, it shall be ignored.

A husband's denial of his wife's assertion that she is married to him does in no way necessitate repudiation. The husband's denial only amounts to a repudiation if made with that specific intention.

If two assert that they are both married to the same woman, and it is impossible to prove who was the first husband, such marriage shall be annulled by an irrevocable repudiation on the part of both husbands.

There are two conflicting opinions as to whether the declaration of husband and wife that they were duly married is sufficient to establish rights of succession as between the two parties.[1]

Where two parties declare themselves to have been duly married in a foreign country, their right of inheriting from each other shall in no way be contested. This is also the case, where the parties are still under the age of puberty, provided the wife's father certifies the authenticity of the marriage.

Sub-section 2. Of contentions as to the shares, quality, nature and payment of dower.

Where contentions as to the dower arise, prior to consummation and prior to repudiation, both parties shall swear that their assertions are true, and the marriage will be dissolved by means of a repudiation. Such contentions will, moreover, be treated and settled according to the principles governing sales. If only one of the parties makes oath, the decision will be in his favour. In every case the dissolution of the marriage is left to the discretion of the Ḳâḍi.

If contentions as to the respective shares, and the quality of the dower arise after cohabitation, or repudiation, either as between husband and wife, or as between the heirs after the husband and wife's death, or as between the heirs and the surviving party, the husband's,

[1] It is necessary to recollect, with regard to the difficulty that exists in establishing the facts concerning marriages and births, that the Muhammadans have no registers. In Islâm, people are born, marry and die without any record being kept anywhere. There is nothing that corresponds to a Registry Office. The *kitab*, which corresponds to our marriage certificate and marriage contract, is an ordinary sheet of paper signed by the witnesses, the parties, and by a *Shaikh*. This document, of which no copy is kept, is left in the hands of the husband and wife; this being the usual procedure. Deaths are only recorded if there is a written will; in this case, the judicial authorities take charge of the record, since there is a profit to be made. In the matter of births no one ever pays any attention. (Perron, II. p. 643.) For form of contract, see p. 94, note 1.

or his heir's, sworn statement shall be believed, provided it appears to be the most probable one. If the woman's declaration appears more probable, the decision will be in her favour. If the parties are still alive, the decision will be given against the one who refuses to make oath.

Should, however, after the consummation of the marriage, or after repudiation, or after the death of either or both parties, contentions arise with regard to the nature of the dower, the husband, or his heirs, shall have to deliver the customary dower, provided such dower does not exceed the amount claimed by the wife or her heirs, or is not inferior to the amount which the husband intended to spend on his wife's dower.

Where the parties are still under paternal authority, or under guardianship, their declarations as to dower are of no value. The question is settled as between the representatives of the parties.

Where the husband is master of his wife's slave-parents, and contentions arise between husband and wife, prior to cohabitation, as to which of the wife's parents is to be freed, and provided there is nothing said on the subject in the marriage contract constituting the dower, then the parties shall make oath as to the truth of their assertions. The marriage shall then be dissolved by means of a repudiation, and the wife's father shall be enfranchised. The same course will be pursued if the parties refuse to make oath. The right of patronage over the freed man belongs to the wife. If the wife only makes oath, both her father and mother shall be freed and the wife retains the right of patronage over both. If, however, the wife was repudiated prior to cohabitation, the husband is entitled to be reimbursed half his wife's mother's value. If the contention had arisen after the consummation of the marriage, the husband's sworn statement shall be preferred, and the father shall be enfranchised.[1]

If the wife be a minor, her *Walî* shall swear in her stead, and is responsible to her for what she declares she did not receive.

If the contentions arise subsequent to consummation of the marriage, the husband's sworn declaration shall be decisive. Generally speaking, a woman does not deliver 'that which she sells of her person' before she has received the price.

Sub-section 3. Of contentions as to household furniture.

If contentions arise between husband and wife concerning house furniture, whether before or after consummation, before or after repudiation, whether they be Muhammadans or not, living together or apart, and if there is no proof as to who is the owner of the different articles of furniture, then the question is to be decided according to local

[1] The declaration of a wife, who is emancipated and mistress of her actions, shall be given effect to, where, prior to cohabitation, she denies her husband's assertion that she has received the portion of her dower that was stipulated for

custom. Thus, the wife will be awarded those objects which are generally used by women, jewellery, ornaments etc., the ownership of which she claims on oath.

Of the other objects, commonly used by both, the husband shall be awarded those which he claims on oath to be his own.

The same rule would apply to any such contentions arising between individuals living together. If the wife is poor she is merely entitled to the value of her dower ; if the husband is of poor family, he receives that which is likely to belong to him personally.

Linen belongs to the wife, unless the husband proves that the flax belonged to him, in which case the linen is common property. If the wife has made a cloth and claims to have spun the thread for it, and the husband affirms that he also spun the thread for the wife to weave, the wife shall only then keep the linen if she can prove that she has spun the thread for her own use.

If the husband declares on oath that some objects commonly used by women were bought for his own use and not for his wife's, such objects shall be awarded to him ; a similar assertion on oath on the part of the wife, shall also be given effect to.

Section XIII

Of the Wedding Feast. Of Circumstances under which Guests are excused from participating

The wedding feast [1] is at the expense of the husband, and must take place at a fixed date shortly after, but always after, the consummation of the marriage. The giving of a wedding feast is a duty established by the Prophet's own example.

One feast may suffice where a man marries several women simultaneously.

Canon Law demands that all guests, whether individually or collectively invited, should accept the invitation ; even he who is fasting should attend, unless he knows that the repast will end before sunset, in which case he need not accept.

The following rules must be observed, for otherwise the guests are permitted to refrain from attending :

(*a*) No objectionable person, whose presence would make the others uncomfortable, for example, a man of low breeding, is to be among the guests ; an Infidel may accept an invitation.

(*b*) No article whose use is blamed by the Law is to be in the place where the feast is held ; for example, pieces of silk to sit upon, or vases made of gold and silver, such as the *kumkum* or long-necked flagons used for throwing scented water about.

(*c*) No carving or relief work of a living creature, man or beast, whole or in part, is to be placed in the banqueting place, either on a

[1] For full description of wedding feasts in Cairo, see Lane, I. Ch. VI.

wall or pedestal.[1] It is in no way unconventional even for people of high position, religious or social, to accept the invitation so long as no forbidden or blameable amusements are carried on. The entertainment of the guests by means of tambourines and large drums, or with the performance of chaste and simple melodies, is permissible; but the presence of tight rope dancers is sufficient cause for a guest to refuse being present at the feast.

(*d*) There must not be too large a crowd of guests.

(*e*) No guest should need fear the risk of finding the door closed when he arrives, or of hearing observations of any kind being made on his arrival.

According to the Prophet, the guest who has already had his meal must, as a matter of courtesy, take some light food.

No uninvited individual is to mix with the guests, even though he may have no intention of eating anything.

The Law blames the throwing of sweets and almonds among the guests.

According to Ibn-Ḥabîb the big drum may be played, but without the accompaniment of a tambourine. Ibn al-Ḳâsim b. Kinâna [2] allows the tambourine but without the mandoline. Both these jurists also allow the use of a fife, or *mizmâr*, and a horn.

Section XIV

Of Marital Favours.—The Wives' Dwellings.—Of Journeys

Every husband shall, under all circumstances, spend an equal number of nights with each of his wives. He need not, however, have an equal amount of sexual intercourse with each, but may follow his own desires.

If the husband is insane, his guardian or representative must provide for the women's daily needs and bring him successively to each wife.

If he is sick he shall also give each wife an equal share of his time, unless he be too ill to move.

Each wife, whether slave, Muhammadan, Christian or Jewess, has equal claims on the husband's time.

[1] Muhammadans are essentially iconoclasts. By prohibiting images, Muḥammad wished to prevent and destroy idolatry among the Arabs. But at the same time, he also nipped in the bud the expansion of their art and that development of the sentiments which results from such expansion.

Any statue or image of an animal which may cast a shadow owing to its relief, whether it be of a permanent nature or only temporary, as where it is made of pastry, is strictly forbidden.

Dolls, however, are permitted to small girls in order to help in the development of their maternal instinct. Painted pictures of animals are reprehensible and blamed by the Law. Inanimate objects, such as plants, trees, a mosque or a minaret may, however, be represented in relief. (Perron, II. p. 654.)

[2] One of the earliest of the great jurists of the Mâliki School, intermediate between Mâlik himself and Saḥnûn. Cf., *Risâlah*, p. xx. See also p. 8, note 4.

The Believer, newly married to a virgin, even though she be a slave, shall spend seven consecutive nights with her; if she is not a virgin, then three consecutive nights.[1] The other wives cannot claim any compensation for this, or make any objection.

The husband may spend a night due to one wife with another, provided he has the former's consent. Again a wife may make a present to her husband in order to gain his special attentions, or she may buy from another wife the latter's turn.

The husband may :—

(*a*) Allow two or all of his wives to live in one house, provided they all consent to it, and provided each has her apartment or private room; those who object to living together shall be quartered in separate dwellings, not too far apart.

(*b*) Live by himself in a separate house and send for his wives to come to him there. But it is better for him to imitate the Prophet's example and go in unto his wives in their own apartments.

(*c*) If the wives live in distant places the husband may apportion the time to be spent with his wives, by the week or by the month.

If the husband goes away on a voyage, he may choose one of his wives to accompany him. If the journey is not too difficult, the wife who has been chosen is obliged to accompany her husband, otherwise she runs the risk of being left behind without means of subsistence.

If the husband leaves on a pilgrimage, or with the object of going to war, or into a hostile country, the wife who is to accompany him shall be chosen by ballot. Some jurists maintain, however, that the husband may, under all circumstances, choose the wife who is to accompany him.

Section XV

Of the Husband's Authority and Power. Quarrels between Husband and Wife at Home. Arbitration thereof

When a wife is wanting in the respect and submission she owes her husband, the latter shall exhort and remonstrate with her: reminding her of duty's path, and telling her of the destinies of the life to come. If she makes no amends he shall cease cohabitation with her; should this prove of no avail, he may beat her, if he thinks that violence will have the desired effect. The blows are to cause no fracture, wound or serious bruise.

If a wife has complaints against her husband, she may report to the Ḳâḍi, who shall, if the complaint is found to be just, severely admonish the husband as to his duties and may even cause him to be chastised. A similar complaint against a wife may also be submitted to the Ḳâḍi.

If a woman has made several complaints without being able, however, to prove the facts, the Ḳâḍi shall order the woman to live among people of probity, if this should not already be the case, whose

[1] Cf., *Risâlah*, rule 99.

testimony can be implicitly trusted and who may themselves assist in arriving at the truth. If, in spite of this, no satisfactory result is obtained, the Ḳâḍi may appoint two arbitrators, one of which is to be, if possible, of the husband's, the other of the wife's family. Strangers are only to be appointed in default of any relations, and then two neighbours shall be preferred.

These arbitrators must not be people whose sincerity is not entirely trustworthy, nor may they be under age, nor women, nor men who do not understand the mission they are entrusted with [1]; for they are not mere observers or witnesses, but judges who will have to decide the question. Thus, if they declare themselves in favour of repudiation, their declaration shall have the force of a judicial decree. The judgment of the Ḳâḍi is not required.

These arbitrators can, however, only pronounce a single, or revocable, repudiation. There exists, therefore, always a possibility of reconciliation, which would be excluded by a triple or irrevocable repudiation.[2]

Besides, if it be proved before the Ḳâḍi, that the husband misbehaves towards his wife; for example, should he brutally beat her; then the wife may obtain a release, even though it cannot be proved that cruelty has been long continued.[3]

Both arbitrators shall endeavour to reconcile the parties, and if they are unsuccessful, they decide according to the merits of the case. If the husband is in the wrong, they pronounce the separation without formal divorce, that is without obliging the wife to pay compensation; on the other hand, if the woman is in the wrong, they shall cause the spouses to live together again, after obtaining the husband's promise to treat his wife wisely and kindly; or again, if they consider it more befitting, they order a divorce and settle the amount which the wife shall pay for her release, which amount may exceed her dower.

Husband and wife may, without resorting to the judicial author-

[1] i.e., they must be *'adl*.

[2] Prior to Islâm divorce was a frequent occurrence among the Arabs. Every individual took as many wives as he could afford to keep, and separated from them at his discretion. In Muhammadan Law divorce is not a disgrace, as it is not the necessary consequence of the misconduct of either party, nor of both. Divorce is the means by which a wife may free herself from the *mundium* of marital authority. Thus divorce is also called in Arabic 'agreement' or 'redemption'.

In ancient legislation there is nothing to be found which exactly corresponds to the Muhammadan divorce. (Perron, II. p. 654.)

[3] These are the cases of divorce that come before administrative officers in the Native Courts Cause Lists. The intervention of the Courts is never necessary to enable a husband to repudiate his wife, but is always necessary when the wife is the plaintiff. The dissolution pronounced by the Ḳâḍi is irrevocable; the unpaid balance of dower becomes at once demandable, and the woman begins her *'iddah*; cf., Zeys, I. pp. 61–63.

ities, designate one single arbitrator who shall have the above mentioned powers.

Where the parties have themselves appointed two arbitrators, they may put an end to their functions ere these arbitrators have completed their investigations or arrived at a decision.

In the case where the two arbitrators order a divorce, but do not agree on the question of compensation, then no repudiation will take place and matters remain as they were. If the compensation is specified as being at the wife's expense, repudiation takes place *ipso facto*.

Section XVI [1]

Of Release [2]

Sub-section 1. Of the consideration.

Release is but one form of repudiation. Release is lawful provided compensation be paid, by means of which the wife frees herself from her husband's authority; no judicial interference is necessary. This is an incomplete way of defining release, since release is also

[1] Sections XVI to XXII on release and repudiation have been very shortly summarized. The subject bristles with difficulties, and is one in which the natural subtlety of the jurists has had full play. For a clear and lucid exposition of the subject, the student is referred to Zeys' *Traité de Droit Musulman*, the manual in use at the School of Muhammadan Law in Algiers.

[2] A summary of the different ways in which a marriage can be dissolved is here given, extracted from Zeys, I. ch. ii.

The generic term applied to any dissolution of marriage is *ṭalâḳ*. There are eight different ways in which *ṭalâḳ* can take place.

(1) Where there is aversion on the wife's part for her husband, and the former leads her husband to consent to a dissolution in return for compensation. This mode is known as *khula* or Release, see pp. 122–127. Cf., *Risâlah*, rules 80, 118–120.

(2) Where the aversion is mutual. They separate without the paying of compensation, *mubâra't*. See pp. 122–127.

(3) Where the husband on his own initiative dissolves the marriage. The action by which he banishes the wife constitutes *ṭalâḳ* in the original sense of the term. See pp. 127–132. Cf., *Risâlah*, rules 65–79.

(4) The term *ṭalâḳ* is also applied to repudiation by the wife with the sanction of the Ḳâḍi. See pp. 119–120.

(5) When a marriage is dissolved by judicial decree, the dissolution thus pronounced is tantamount, in its effects, to repudiation. 'Nullity of Marriage.' See pp. 96–98. Cf., *Risâlah*, rules 91–97. 'Option and Husband missing,' pp. 101, 104, 106, 142.

(6) Where the husband has sworn, taking God to witness, that he will no longer cohabit with his wife. This act, insulting to the wife, involves a dissolution of the marriage, and is called *îlâ'*. See p. 135. Cf., *Risâlah*, rules 104–105.

(7) The husband injuriously assimilates his wife to another woman with whom all connexion is forbidden. Such an assimilation, *zihâr*, involves a dissolution. See p. 137. Cf., *Risâlah*, rules 106–113.

(8) The husband accuses his wife of adultery, by which he severs the union. This mode of dissolution is known as *li'ân*. See p. 139. Cf., *Risâlah*, rules 114–17,

lawful even without an indemnity or compensation being paid[1]; it may also take effect by judicial decree.

The compensation may be paid by some other person than the wife, provided the said person is not under authority or guardianship.

Neither the woman under the age of puberty, nor the unemancipated woman, nor the woman who is still partially a slave, may take it upon herself to pay compensation to her emancipated husband, and consequently she is unable to obtain a release. If a release has been agreed to by both parties and the husband has actually received the compensation, he shall return it and the woman is irrevocably repudiated.

A father or guardian may obtain a release on behalf of his daughter or pupil who is still under his authority, and upon whom he has imposed marriage. This may be done at the woman's expense and without her assent. But a guardian who has not absolute authority over his pupil must obtain her consent.

A wife may ask her husband for a release in consideration of a payment of imperfectly determinable amount, such as the unborn child of a slave belonging to her, or animals which have gone astray, or a run-away slave, or unripe crops, or some chattel to be given at an undetermined date.[2]

In the aforementioned cases the husband may choose animals and goods of average quality, except of course as regards the unborn child. Moreover, the husband has no claim if the slave, who appeared to be pregnant, does not bear a child.

Again a wife may release herself by means of a *khula* divorce, upon condition: (*a*) that she shall personally provide for her subsistence during the whole period of her pregnancy; (*b*) that she shall renounce her right of bringing up the infant in favour of the husband.

She may also stipulate for a release combined with a bargain. For example, she may hand over a slave, half of whose value is by way of compensation, the other half being a sale to the husband. Should, however, the said slave have run away, then the half which was alienated by the wife as compensation, does in fact release her, but the sale of the other half is null and void. The wife then must refund to the husband the price she has received for the half sold to him, and the husband only retains that half of the slave which constituted the compensation. The divorced parties are then co-proprietors of the slave.

If no date has been fixed upon which payment of the compensation for the release is to fall due, it must be paid to the husband at once. Some jurists insist that the price ought to be paid on the very day the parties are divorced.

[1] This is the form of release known as *mubâra't*.

[2] This is a derogation from the principles of an ordinary contract, demonstrating that the Law looks with particular favour on this form of divorce, *khula*, where the parties separate in an amicable fashion.

When the compensation is to be paid in money the husband may request his wife to exchange any base coins she may have given, unless there existed a stipulation to the contrary.

A release shall nevertheless stand, even though the indemnity consists either of things that are absolutely forbidden, such as wine, or of things that are not so absolutely forbidden, such as pork; or again of things forbidden owing to a possible contingency, as for instance, where a *umm walad* falls to be enfranchised; or lastly, if the things given in consideration were obtained by violent means or by usurpation. Of these things that are unlawful some shall be returned, others destroyed, and the husband can claim no compensation.

A divorce cannot be agreed to upon condition that a debt owed to the husband by the wife shall be paid at a later date; neither is it permissible, though the release will stand, to condition it upon the departure of the wife from the home where it was concluded, for the wife must remain in that home for the whole period of the *'iddah*.

Sub-section 2. Of the effect of release. Of certain circumstances that exclude or necessitate release.

So soon as a release has been agreed to by both parties, the wife is completely separated from her husband, even though no compensation has been fixed. The effect will be the same when the husband has merely used some expression implying release, as where he should say: 'Go away, thou art no longer under my authority.' Again, a separation amounts to a release when a husband separates himself by a revocable repudiation, having previously accepted compensation offered by the wife with a view to her obtaining a release; or when the wife, after a revocable repudiation, delivers to her husband during the *'iddah* something of value on condition that her husband shall renounce his right of renewing the marriage[1]; or lastly, where the husband sells his wife, or gives her in marriage to another.

A repudiation pronounced by judicial decree on account of physical defect or ill-treatment is equal in its effects to a release. This does not apply to the case where a husband is under a vow of continence nor where he is in financial difficulties and unable to provide maintenance for his wife. In both these cases, a repudiation decreed by the Ḳâḍi is an imperfect one.

Sub-section 3. Of the right of granting a release.

A husband who is of sound mind and over the age of puberty, though he still be under his father's authority, has the exclusive privilege to decide upon and grant a release.[2] A release may also

[1] See p. 132.

[2] Though the negotiations for a divorce by means of compensation paid by the wife, *khula*, or without compensation, *mubâra't*, would in practice usually be begun by the wife; still it is for the husband to accept or not, as he pleases, his wife's propositions, and for him to pronounce the repudiation. No recourse to the Courts is necessary.

be given by someone delegated by the husband for that purpose, or even by the husband in a state of intoxication. No compensation is necessary where the release is granted by a husband who has not attained puberty, or by a husband deprived of his reason.

In the case of a husband who is a minor or insane, his guardian, whether he be his father, master, or guardian, is entitled to grant a release in his ward's name. But the compensation is always to be received by the husband himself.

Neither the father of a husband over the age of puberty, though still under his authority, nor the master of a slave over the age of puberty, has the right to give a release in the name of the son or slave they represent.

Sub-section 4. Of release in cases of illness, and of rights of inheritance in case of death or recovery.

A release is valid, though given by the husband whilst dangerously ill or whilst at the wars, or in prison under sentence of death or mutilation; it is, however, reprehensible to grant a release under these circumstances, since the probable object in granting the release is to defraud the wife of her rights of inheritance. If the husband dies, the wife inherits from him, but not he from her if she dies during her husband's illness, since he has personally divested himself of his rights. Where a wife unintentionally kills her husband, she nevertheless inherits from her husband without prejudice to the payment of blood-money; if she purposely kills her husband, she loses her rights of inheritance, but need not pay blood-money. Again if the husband, whether ill or not, allows his wife the option of release or of maintaining the marriage at her own discretion, the wife is entitled to inherit from her husband; but the husband cannot inherit from his wife should she die during his illness.

These rights of inheritance are as above set forth; where the husband, who is sick, accuses his wife of adultery: an accusation which amounts to a repudiation; or, in the case of a conditional repudiation, as where a husband says to his wife: 'If thou goest to that man's house thou art repudiated'; or again, in the case where a woman, whether she be a Jewess, Christian or slave, has been irrevocably repudiated by her husband who was sick, and she subsequently embraced Islâm, or has been freed during her husband's illness which has caused his death.

Where a wife has been repudiated by her husband during his illness, and where after having duly undergone her *'iddah* she has married several other husbands successively, who have each in turn repudiated her during their last illnesses, she shall be entitled to inherit from her first husband and from all the others, though she may be at the time married to some other individual.

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If a husband, having recovered from an illness during which he has revocably repudiated his wife, fails to take her back, and falling ill again, utters a revocable or irrevocable repudiation against her and then dies, she only then inherits from him if the *'iddah* due for the first repudiation has not yet expired.

If a husband declares or confesses before witnesses that he has repudiated his wife prior to his illness, and if the wife has undergone the whole or merely the latter part of the *'iddah* during the said illness, the result will be the same as though the repudiation had been effected during the illness. If the husband dies, his wife inherits, though she may have subsequently married someone else.

Moreover, the *'iddah* shall only be reckoned from the date on which the husband made his declaration or confession.

If, after the husband's death, it is proved by witnesses that he did repudiate his wife by means of a revocable or irrevocable repudiation, and if the expiration of the *'iddah* coincides with the date given by the witnesses, the wife is entitled to inherit. This case is analogous to the one where repudiation took place during the husband's illness.

Where the husband irrevocably repudiates his wife during an illness, and then remarries her, prior to his recovery, the effect will be the same as in the marriage of a sick man to a woman unknown to him. Such a marriage is null and void and must be dissolved before consummation. If the dissolution of marriage only takes place after consummation, the wife shall be entitled to the contractual or customary dower, whichever is the least of the two.

It is blameable to release a woman who is seriously ill. Such a release is, however, valid; and neither husband nor wife can inherit from each other. According to Mâlik and a great number of jurists, the husband must return to the wife's heirs any compensation he may have received from her.

Sub-section 5. Of release by proxy. Cases in which the compensation must be returned.

If an agent, sent by a husband to obtain his wife's acquiescence to a release, himself consents to a smaller compensation than that specified by the husband, release is not necessarily obligatory upon the parties, unless it was immediately effected.

Again, where the husband mentions no fixed compensation to his agent, and the latter accepts an amount far below what is customary, that is, out of all proportion to the woman's rank and beauty; then, if the husband makes oath that he wanted at least the customary amount, the release is not binding upon the parties.

If the agent goes beyond his instructions, the release remains obligatory, and the agent is obliged to pay the unauthorized surplus himself.

A husband shall be obliged to return the compensation, if his wife can prove[1] that she is demanding divorce on account of her husband's ill-treatment. The wife shall be separated by a complete repudiation. The husband shall only then be entitled to retain the compensation if the wife is proved to be habitually quarrelsome, or disregards his authority. Again, the indemnity is returnable by the husband, if he repudiates his wife after having already irrevocably repudiated her; or if the marriage is null and void independently of any repudiation, for example, where the woman in question is his fifth wife. Compensation is also returnable by the husband if it is proved after the release that the husband was tainted with a defect entitling his wife to exercise her option.

Sub-section 6. Of certain agreements for release and of the special obligations they involve. Of propositions with respect to the consideration.

A stipulation, in the nature of a consideration, that the released wife who is in a state of pregnancy shall solely provide for her child from birth to weaning, is lawful. Any stipulation, however, which purports that the wife shall provide for her husband, or any other individual, is not binding. If the infant dies before the two years, fixed as the nursing period, have expired, the father can claim nothing from the mother. But, if the mother dies during those two years, or if her milk fails, or if she gives birth to twins or triplets, the expense of maintaining the children is to be borne by the mother or her heirs. If she cannot meet all expenses, the father is to assist her.

Where the compensation stipulated for was a runaway slave, or an escaped animal, belonging to the wife, the husband shall pay for the expense of finding them, unless there was some agreement to the contrary.

Where the unborn child of a slave, belonging to the wife, has been stipulated for as a compensation for release, the slave's maintenance shall be borne by the wife. So soon as the child is born, the husband must provide for her. The divorced parties shall then be constrained to become joint owners of mother and child, either by selling them to one individual, or by agreeing, as between themselves, that the husband shall buy the mother and the wife the child.

In order to establish a proposal and acceptance of release it is sufficient for the parties to give each other certain articles, or to make certain signs or do certain acts, which, according to local custom, are recognized as the outward signs of a release. Thus, with certain Arab tribes of the desert, it is the custom for the wife to dig a trench, which the husband then fills with earth; this signifies that everything between the parties is buried, that they have nothing more in common.

[1] Before a Ḳâḍi.

If the compensation offered by the wife proves to be something that she did not actually possess, the release granted is thereby invalidated. Again, there is no release if the husband demands compensation without specifying the amount, and the wife offers something much below what is customary.

Sub-section 7. Of compensation for release.

If a husband declares that he has agreed to a release in return for such and such an amount or such and such an object, and his wife maintains that the marriage was dissolved by an ordinary repudiation,[1] or that the indemnity agreed to was smaller than or different in kind to the one now claimed, the divorce is valid, provided the wife swears that she is speaking the truth. The wife shall then only pay that which she declares to be the compensation agreed upon. If she refuses to make oath, and the husband does so, he shall receive what he claims; if he refuses to make oath, he is entitled to nothing at all.

In the following cases the husband's sworn statement shall alone be accepted as the true one: (*a*) where the contention between the parties refers only to the number of repudiations; (*b*) where the husband declares that the slave, now absent, who was agreed to as indemnity, had died, or was tainted with a redhibitory defect prior to the acceptance of release. In this case the wife is entirely responsible. If she can prove, however, that the slave died, or was affected with the redhibitory defect after acceptance of the release, the wife's responsibility ceases, and the husband has no claim.

Section XVII

Of Repudiation [2]

Sub-section 1. General character of repudiation. Of repudiation during menstruation.

If a repudiation is to satisfy the demands of Canon Law, the following conditions must be fulfilled :—

(*a*) Not more than one repudiation should be pronounced at one time.

(*b*) It must take place whilst the wife is in a state of purity, that is not during the period of menstruation nor during the period after childbirth.

(*c*) It must be pronounced during the said period of purity, prior to any sexual intercourse between the parties.

(*d*) It must not be pronounced during the *'iddah*.

If a husband repudiates his wife during her period of menstruation, he shall be constrained to take her back. The same rule applies where repudiation takes place during the period following confinement. If the husband refuses to take her back, he may be imprisoned and

[1] *Ṭalâḳ*, see next Section.

[2] *Ṭalâḳ*; see p. 121, note 2.

even beaten. If this is of no avail, the Ḳâḍi shall force him to do so by judicial decree.

A woman's declaration that she was repudiated during her courses shall be accepted as true without oath or corroboration.

Sub-section 2. Of cases where the use of certain expressions necessitates either irrevocable or revocable repudiation.

The following expressions if used by the husband, imply an irrevocable repudiation, also called a 'triple' repudiation :—'Thou art repudiated by the most disgraceful, the worst, the dirtiest, the most hateful repudiation.'

A repudiation is only 'single' where a husband says :—'Thou art repudiated by the best repudiation,' or 'by an only and excellent repudiation.'

Sub-section 3. Of circumstances which either establish or exclude the validity of a repudiation. Of cases in which illicit cohabitation and lies are permitted. Insulting the Prophet and the Faithful.—Of oaths that do, and others that do not, necessitate repudiation.

A repudiation is valid only if effected by a Muhammadan, over puberty and of sound mind.

A repudiation which is effected by a third person who is neither an agent nor a proxy, but who has merely the husband's vague directions, has the same validity as a bargain concluded by a third person who is not the recognized agent of the buyer.

A repudiation effected under pressure of intimidation or ill-treatment is invalid.

If, however, the means of intimidation are in fact directed against a stranger who is in no way related to the husband, and the latter repudiates his wife in order to avert the danger from the said stranger, then the repudiation remains valid.

Any irreligious act, or blasphemy uttered against the Prophet, or any insults against a Muhammadan, are only excusable under the threat of certain death.

Similarly, illicit cohabitation with a man is excusable in the woman if she is in absolute poverty and unable to provide for her infant children. It is, however, more glorious in the eyes of God to resign oneself to death.

A Believer shall never, even under the threat of immediate death, consent to kill or mutilate a Muhammadan, nor to commit adultery or rape.

Sub-section 4. Of the time when a repudiation takes effect, and of the period during which it may remain obligatory.

A repudiation takes effect so soon as it is pronounced, or so soon as the occurrence has happened which, on the husband's oath, con-

stituted the condition precedent to repudiation; provided always the wife is still under her husband's authority.

Sub-section 5. Of expressions involving repudiation. Of the different kinds of repudiation they necessitate. Repudiation by signs and indirect means.

Words that involve a repudiation are those which are admitted by custom to import a severance of the wife's dependence on her husband, such as:—'I repudiate thee,' or 'I separate myself from thee by repudiation,' etc. These expressions merely establish a 'single' repudiation, unless it was the husband's intention to imply a 'double' one.

A 'triple' repudiation is effected by the use of the following expressions:—'Thou art divorced thrice,' *anti ṭâliḳ battah*, that is, 'thy union with me is broken, shattered'; or again: 'The reins are on thy shoulders,' which means, 'I let thee go free.' Again, the expressions 'Go thy way,' or 'Go back to thy house,' or 'Thou art repudiated by a single repudiation,' import a 'triple' repudiation, provided the marriage had been previously consummated, and the husband intended it to be an irrevocable repudiation.

Generally, where the husband uses some expression from which repudiation might be inferred, he shall have to declare on oath what his intention was.

Any act done, which clearly signifies an intention to repudiate, obliges the husband to carry it into effect. A dumb individual may effect a repudiation by means of signs.

If a husband says to a third person:—'Go and tell my wife that she is repudiated,' repudiation becomes obligatory.

Sub-section 6. Of divers meanings attached to expressions involving repudiation.

Where a husband says:—'Thou art repudiated, and repudiated and repudiated,' that is, repeats an expression involving repudiation, such repudiation shall be considered a 'triple' one. The same rule applies where the husband says:—'Thou art repudiated, plus two repudiations,' or where he merely repeats the word 'repudiated' three times consecutively.

Expressions such as 'Thou art repudiated by half a repudiation,' or some other fraction, always imports a 'single' repudiation.

A 'double' repudiation, however, is effected if the word repudiation is repeated twice, as in:—'Thou art repudiated by a quarter of a repudiation and half a repudiation.' In this case each isolated fraction amounts to one complete act of repudiation.

If a corrective term is immediately applied to the number of repudiations expressed, that term modifies the repudiation in accordance with its meaning but does not entirely annul it.

Section XVIII

Of Conditional Repudiations

Sub-section 1. Of circumstances and expressions which render a conditional repudiation immediately obligatory.

A repudiation shall immediately take effect, where it has been made subject to a condition concerning some past fact ; e.g., 'I swear by my wife's repudiation, that if I had gone to X. yesterday, I would have killed him.'[1]

Again a repudiation shall immediately take effect if it is made conditional upon a future occurrence, at which, in all probability both parties will be present ; e.g., 'Thou art repudiated on the day of my death.'

Again, where a repudiation is conditional upon an inevitable fact, or one which is almost certain, or one which is obligatory, the repudiation takes effect immediately. This is also the case if the condition consists of some fact at present undeterminable, e.g., 'If thou hast conceived, thou art repudiated,' or if the condition attached to the repudiation is unknown to any human being, e.g., 'Thou art repudiated, if it pleaseth God.'

A repudiation is also obligatory if made subject to a negative condition implying an unlawful act as : 'Thou art repudiated if I do not commit adultery.'

Sub-section 2. Of circumstances and expressions which do not render a conditional repudiation obligatory.

Sub-section 3. Circumstances under which a conditional repudiation : (*a*) does not take effect immediately ; (*b*) necessitates an interruption of matrimonial relationship ; or (*c*) takes effect at a fixed date.

A repudiation shall not take effect immediately where it is dependent upon a condition based on some particular and precise fact, and relates to an individual : e.g., 'Thou art repudiated on the day Zayd shall arrive.' The arrival of Zayd must be awaited.

If the condition indicates no determinable date upon which it is to be fulfilled, the husband shall abstain from all intercourse with his wife until it is seen whether the condition is realized : e.g., 'Thou art repudiated if Zayd does not arrive.'

Sub-section 4. Of doubtful cases of a conditional or unconditional repudiation. Of repudiations based on a double condition. Consequences of these repudiations.

[1] Almost all oaths involving a repudiation are examples of conditional repudiations, that is, they are dependent on the fulfilment or violation of the oath. (Perron, II. p. 658.)

SECTION XIX

GENERALIZATION OF TESTIMONY RELATING TO REPUDIATIONS

SECTION XX

OF CASES IN WHICH REPUDIATION IS LEFT TO THE DISCRETION OF THE WIFE

Sub-section 1. Of the immediate consequences of a repudiation left to the choice of the wife. Declarations made by the wife.

In cases where a husband leaves it to the discretion of his wife to ask for a repudiation, he is at liberty, whilst reserving the right to pronounce and conclude it, to interrupt or continue conjugal relations until the repudiation is accepted and decided upon by the wife.

This interruption of conjugal rights is, however, obligatory, if the marriage contract contained certain conditions in favour of the wife; e.g., where it was stipulated that the husband's second marriage should entitle her to decide as to her own or the second wife's fate. Again, interruption is obligatory where the repudiation is entirely left to the wife's discretion, e.g., by the words: 'Decide upon thy fate,' 'choose what pleases thee.' All relations must be severed until the wife has given a definite answer.

If the husband has given the wife a year or more to decide in, the wife shall be obliged to express herself so soon as her representative hears of the delay. If she does not at once decide she is deprived of her power of option. Again, if the delay granted to the woman is exceeded, without arriving at a decision, her power of option is lost.

If a wife has the intention of showing by some act, for example, as where she takes away her belongings, that she consents to being repudiated, the repudiation is to be considered an accomplished fact.

Sub-section 2. Of the parents' respective rights where repudiation is left to the wife's choice or discretion. Consequences of the divers forms under which repudiation has been requested.

If a husband has, prior to conjugal relations, left the repudiation to the choice of his wife, he shall be entitled to accept but a 'single' repudiation. The following conditions should, however, be fulfilled: (*a*) that it was his original intention to ratify but a 'single' repudiation; (*b*) that he expresses at once his refusal to accept more than a 'single' repudiation; (*c*) that he certifies on oath that he originally only wished to accept a 'single' repudiation; (*d*) that he did not use any term from which more than a 'single' repudiation might be inferred.

Once a marriage is consummated, the husband can no longer refuse to accept an irrevocable repudiation. In this case, moreover, a 'triple' repudiation shall be pronounced whatever may have been his wife's intention.

If the husband fixes time and place where the wife is to exercise

her option, and she disregards either time or place, she loses her privilege.

Sub-section 3. Of cases in which certain conditions are attached to the wife's discretionary right of petitioning a repudiation.

Here the same rules apply as those applicable to conditional repudiations. Thus, a repudiation which may be petitioned for at the wife's discretion, is either obligatory or null, according as to whether the conditions upon which the repudiation is made to depend are of an obligatory nature or not.

Sub-section 4. Of a repudiation effected by means of a third person or agent.

Generally speaking the Law considers it blameworthy to concede the right of asking for a repudiation to a third person.

Section XXI

Of the parties' Return to the State of Matrimony after an Imperfect or Revocable Repudiation

Sub-section 1. Conditions necessary in order to re-establish a matrimonial union. Circumstances that prevent, invalidate, or legalize this second union.

A Muhammadan, of whatever condition he may be, is permitted to *return* to the wife he has revocably repudiated, and thus establish again the former union.

The following conditions must be fulfilled in order to allow of a re-union :—

(*a*) The repudiation must neither have been an irrevocable one, nor a release.

(*a*) The husband must return to the wife prior to the expiration of the *'iddah*.

(*c*) The original marriage must have been in every respect a lawful one.

(*d*) Consummation must have taken place.

(*e*) The husband must have the firm intention to take back the wife.

This re-union is a kind of second marriage, but without contract, *Walî* or dower.

Sub-section 2. The position of a woman who is under a revocable or imperfect repudiation.

So long as a husband may take back his wife, that is, has revocably repudiated her, she does not cease to be his wife. Conjugal intercourse and all other direct relations only are severed. The husband must maintain the woman, and she retains her rights in her husband's succession. So soon as it is proved that the *'iddah* has expired, the repudiation becomes absolute, that is, no re-union can be effected.

Sub-section 3. Of certain obligations incumbent upon the parties who reunite. Of consolation gifts.

It is customary for a husband who wishes to take back his repudiated wife to do so before a number of witnesses, and to present her with a consolation gift in proportion to his wealth.

If the repudiation was an irrevocable one, the gift is to be delivered at once, otherwise upon the expiration of the *'iddah*. In the event of the wife's death her heirs are entitled to the gift. If the repudiation was effected either owing to some great fault committed by the wife, or at her own request, or again, if one party was the others slave, then no consolation gift need be given.

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CHAPTER VI [1]

THE VOW OF CONTINENCE (*ÎLÂ'*) [2]

[1] The Chapter is omitted as containing nothing of practical utility.

[2] *Îlâ'* is an oath to cease cohabitation with one's wife for a longer period than four months. See *Risâlah*, rules 104–5.

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CHAPTER VII[1]

DEFAMATION (*ZIHÂR*)[2]

[1] The same remark applies to this Chapter as to the last.

[2] Defamation or injurious assimilation is a purely ecclesiastical offence atoned for by an expiation. See *Risâlah*, rules 106–113.

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CHAPTER VIII [1]

ACTION OF IMPRECATION (*LI'ÂN*) [2]

[1] Same remark applies as to the preceding chapter.

[2] An action of imprecation occurs when a husband denies paternity or avers adultery on the part of his wife. See *Risâlah*, rules 114–117.

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CHAPTER IX[1]

ʿIDDAH[2]

SECTION I

OF THE WAITING-TERM OR TERM OF PROBATION IN GENERAL. OF THOSE CIRCUMSTANCES WHICH MAKE IT NECESSARY. OF THE VARYING LENGTH OF THE TERM. OF THE MINIMUM AND MAXIMUM PERIOD OF GESTATION. OF THOSE CASES IN WHICH THE WOMAN MAY SUFFER PUNISHMENT

A FREE woman who has been repudiated or released, or who has become a widow, must undergo a term of probation before she can remarry. The object of this term is to make sure whether the woman is pregnant or not.

The length of the term is that of three periods of purity in the case of a free woman and of two in the case of a slave woman.

In the case of illicit intercourse with a man other than the husband, the duration of the term of purification, *istibrâ'*[3], is the same as for *ʿiddah*,

If after accomplishing the *ʿiddah* a repudiated woman or a widow remarries, and has a child within six months, the child is affiliated to the husband for whom she kept the *ʿiddah*, and her second marriage is voided by judicial decree.

The widow or repudiated wife who believes herself to be pregnant will wait through the maximum period of gestation, which is four years, or according to some jurists, five years.

SECTION II

OF THE *ʿIddah* OF THE PREGNANT WOMAN, THE WIDOW AND THE SLAVE. OF THE *ʿIddah* OF THE WOMAN REPUDIATED WITHOUT HER KNOW-

[1] The subject of *ʿiddah*, though a most important provision of the Personal Law, is not likely to occupy the attention of administrators to any great extent. The chapter is therefore but very briefly summarized. See also, *Risâlah*, rules 128–134.

[2] *ʿIddah*, lit. *number*. This term of probation is enjoined by the Korân, Suras II and LXV.

[3] The term *istibrâ'* refers either to the term of purification after illicit intercourse or to the term of continence to be observed towards a newly acquired slave, see p. 143.

LEDGE. OF THE *'Iddah* OF A SLAVE BOUGHT AFTER REPUDIATION OR WHILST A WIDOW.

The *'iddah* of a pregnant woman only terminates on the birth of the child.

The *'iddah* of a widow who proves not to be pregnant is one of four months and ten days. That of a slave widow is half that of a free widow.

SECTION III

OF THE WOMAN'S CONDUCT DURING *'Iddah*

A widow during *'iddah* may only wear black garments.

SECTION IV

OF THE MISSING HUSBAND AND THE *'iddah* OF THE WIFE. OF THE LENGTH OF THE HUSBAND'S ABSENCE. HIS REAPPEARANCE OR DEATH.

The wife of a missing husband who has disappeared in *Dâr al-Islâm* but who is not in prison, may bring her case before the Ḳâḍi and request him to make inquiries.

If the inquiries lead to no result and the missing husband has left no property out of which the wife can maintain herself, the Court pronounces a repudiation which becomes irrevocable on the woman consummating a second marriage.

SECTION V

OF THE *'Iddah* OF THE *mother of off-spring*. OF THE LEGAL DURATION OF LIFE

The *umm walad* remains as she was until the death of the father of her child is either proved or may be presumed.

SECTION VI

OF THE WOMAN'S PLACE OF RESIDENCE DURING *'Iddah*

Sub-section 1. Of circumstances that oblige or do not oblige the woman to undergo *'iddah* in her husband's home. Of change of residence.

A repudiated wife should live retired and alone whilst keeping the *'iddah* or *istibrâ'*. A widow is only obliged to keep her *'iddah* in her husband's house if the marriage had been consummated, or if the house was his own or if he had paid the rent of it before his death. The *'iddah* of a repudiated woman is at the husband's expense.

A woman during *'iddah* may not change her place of residence without good reason. In any case she must continue in her seclusion.

She may only leave her residence to procure what she needs before sunrise and after sunset.

Sub-section 2. Of the expenses of the *'iddah*.

A widow's *'iddah* is at her own expense.

Section VII

Istibrâ'. Of those Circumstances which dispense with it or make it necessary or vary its duration

The term of continence, *istibrâ'*, is imposed upon the Believer on acquiring a female slave, or when proposing to sell her or marry her. Its duration is that of one menstrual period.

Section VIII

Of the Mode of Keeping the *Istibrâ'*

Section IX

Of those Conditions which necessitate a Renewal of the *'Iddah* or *Istibrâ'*

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CHAPTER X

FOSTERAGE (*RIḌÂ*ᶜ)[1]

Section I

Of those conditions under which a Woman's milk establishes Foster Parentage

AFFINITY within the prohibited degrees for marriage is brought about through fosterage extending over a period of two years and two months before weaning.

Section II

Of the impediments to Marriage through Fosterage. Of the Testimony to Fosterage

Section III

Of insufficient evidence to prove Fosterage. Of intercourse before Weaning

Sexual intercourse with a woman during the period of suckling is permitted.

[1] See *Risâlah*, rule 31.

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CHAPTER XI

WIFE'S MAINTENANCE (*NAFAḲAH*)

SECTION I

EXPENSES INCUMBENT ON THE HUSBAND. OF A WIFE'S RELATIONS WITH HER OWN FAMILY, HER CHILDREN BY ANOTHER MARRIAGE, OR HER HUSBAND'S CHILDREN

WHERE both spouses are above the age of puberty, it is the duty of the husband to supply his wife with food, clothes, and lodging, which must be provided on a scale commensurate with the social position of the parties and in accordance with the customs of the country. Though the wife may have a voracious appetite, still the husband is to provide sufficient food to still it ; this is a calamity, but the husband must either resign himself or repudiate the woman.

A wife suckling her child is to be provided with additional food.

If the wife is ill or has a small appetite, the husband need only provide so much food as she is able to consume, and the wife is not permitted to trade with any surplus.

With regard to clothes, the husband need not provide his wife with silk garments. Some apply this principle to all countries, others merely to Medina, because of the simple habits prevalent in the city of the Prophet.

The husband is obliged to provide his wife with the following :— Water for drinking and for ablutions ; oil, for culinary purposes, burning, and for the making of ointments ; wood for cooking with ; salt, and vinegar ; meat, every alternate day, more or less frequently according to the husband's wealth ; a mat and a bed, i.e. a mattress or a coverlet placed on a mat, as may be necessary to avoid scorpions, fleas, etc ; the midwife's fee ; those cosmetics that are recognized by custom, such as *ḳuhl* for the eyes, grease for the hair, henna for the head, hands and feet. The husband is also bound to supply domestic service, rendered by one or more of his slaves. Moreover the wife is entitled to choose as servant the slave she may have a preference for, unless she be a suspected person.

If the husband is poor, or if the woman is of no rank, she will have to do the housekeeping herself, that is, she must prepare meals for the husband, clean the house, etc. But she is not obliged to weave

or spin or sew for her husband; for these things are not comprised in domestic services. A wife is never obliged to try to realize some profit for her husband.

The husband need not provide his wife with medicine; but he must pay the doctor. The husband need not provide his wife with finery.

The husband may use all objects belonging to his wife; he may even wear certain clothes which can be worn by both. The word 'use' here means that he can prevent his wife from selling or giving away the articles. If they were not bought with the wife's dower, but at the wife's personal expense, the husband may prevent his wife from alienating more than one third [1] of the whole. The husband need not renew these articles if they are worn out, except those of primary necessity, such as clothing and bedding.

The husband is not entitled to prevent his wife's parents, or her children by another marriage, from visiting her. The wife may also receive in private any relation within the prohibited degrees of affinity, She is also to be permitted to visit her near relations, provided her virtue is free from all suspicion. The Ḳâḍi may enforce this permission granted by the Law.

The woman's children by a former marriage, when still young, are entitled to visit their mother once a day; if grown up, they may see her once a week. The wife's parents are also entitled to visit her once a week. If the husband suspects them of attempting to alienate her affection, the parents shall only be allowed to see their daughter in the presence of a third person chosen by the husband, or in the presence of the husband himself.

The wife may refuse, unless she is of very low birth, to live in the same house with her husband's near relations. Again, if either husband or wife has a child by another marriage, the one or the other may demand the exclusion of that child from the conjugal roof, provided there is someone to take charge of the said child. If, however, the child has lived with them ever since the marriage, and its presence was known to the party now claiming its exclusion, then the child shall remain.

SECTION II

OF THE PERIODS AT WHICH THE HUSBAND'S ALLOWANCE FOR FOOD AND CLOTHES BECOMES DUE. OF CASES IN WHICH THE WIFE'S MAINTENANCE IS MODIFIED, DIMINISHED OR SUPPRESSED

The allowance due to the wife shall be paid either daily, weekly, monthly or yearly, as may be most convenient in view of the husband's salary or source of income. The wife receives this allowance

[1] A wife can only dispose, *intra vivos*, of one third of her property, whilst a man can so dispose of the whole of his; cf., p. 373.

always in advance, unless the husband is unavoidably prevented from furnishing it.

The wife must receive one winter and one summer garment each year.

The wife is responsible for all she receives, money, food, clothes, etc.; whether these things were given her for her own use, or for the child, she is responsible.

The husband may provide all that the Law demands for the wife's maintenance, either in money or in kind; although in principle, preference is given to maintenance in kind.

The allowance, if paid in money, may vary according to the fall or rise in the price of food-stuffs.

Where the wife shares her meals with her husband, she can claim no allowance for food. But she may refuse to eat with him.

The food allowance ceases to be obligatory so long as the wife, without good cause, refuses to have sexual connection with her husband, or if the wife leaves the conjugal roof without permission, and the husband or Ḳâḍi are unable to prevail upon her to return. The food allowance cannot be cut off if the wife is pregnant.

Further, no house-rent can be claimed by the wife during her absence. As a general rule, where the food allowance remains obligatory, the allowance for clothes remains obligatory also, and *vice versa*. A woman who has been revocably repudiated does not lose her right to the food allowance.

A woman who is separated by an irrevocable repudiation or by release, or by judicial decree, loses her right to a food allowance, provided she is not pregnant.

During her pregnancy the repudiated wife is entitled to receive an allowance which varies according to the husband's wealth, as follows: (*a*) a complete dress, if she is repudiated at the commencement of her pregnancy; or (*b*) a sum of money sufficient to meet necessary expenses during her pregnancy. If she has received a dress at the beginning of pregnancy, she is not entitled to another one.

Section III

Of particular Circumstances which cause the Wife's Maintenance to be varied, or which necessitate a part thereof being returned or altered. Of a Slave's maintenance during Pregnancy.

On the husband's death the use of the home shall be left to the wife during the *'iddah*, whether she be irrevocably repudiated or not, and whether she be pregnant or not. When the house does not belong to the husband, the rent shall be paid out of his estate. On the husband's death; the food and clothes allowance ceases. If the wife

dies when revocably repudiated, her heirs have no right to the rent for the unexpired period of the *'iddah*.

The excess on advances made for the wife's maintenance is returnable upon the death of either party, whether the wife was repudiated or not. The same applies to cases of mistaken pregnancy; everything supplied by the husband is to be returned to him. Clothes, however, which have been delivered some months previously, need not be returned.

When a child dies and his mother had received clothes for him, the father may claim them back. All other advances made by the father for the child, even house-rent, are to be returned to the father.

If a repudiated wife is in a state of pregnancy or is still nursing her infant, she shall receive an increased food allowance.

In the case of a woman, separated from her husband, claiming to be pregnant, she shall receive her special allowance only upon the fact being proved by experts. If the proof is forthcoming, she shall be entitled to the allowance as from the commencement of her pregnancy.

A wife who is pregnant and separated from her husband through *li'ân* has no claim upon a food allowance. For here the husband disclaims paternity; he need only provide for the woman's lodging.

A slave has no claim for maintenance during pregnancy as against the father; but she has one as against her master, since the latter becomes owner of the child, and since the right of ownership is greater than the right of paternity. The ordinary expenses of a slave wife's maintenance are borne by the husband. Even though the slave's master should free the unborn child, he remains responsible for the mother's maintenance during pregnancy.

The husband who is a slave need not provide for the maintenance of his wife, free or slave, whom he has irrevocably repudiated; he can own nothing, and therefore need not maintain his children. If the husband is freed prior to his wife's confinement, he must under all circumstances provide for the child. When a slave has revocably repudiated his wife, he should provide for her maintenance during pregnancy.

Section IV

Of Maintenance in cases of Poverty or Imprisonment or Pilgrimage. Of the Wife's rights to claim the Expenses incurred for her own or her Husband's Maintenance. Of Expenses incurred for the Maintenance of another's Child

A husband is excused from maintaining his wife whilst he is in a state of poverty. The wife must then maintain herself, and she has later on no right to claim compensation.

He is, however, obliged to maintain her during the time he or she

may be imprisoned or detained for a debt, or whilst she may be performing the pilgrimage. During a pilgrimage of simple devotion made without her husband's assent, the wife may claim no maintenance.

The wife may claim from her husband any expenses incurred on his behalf, even during the time he may have been destitute, provided these expenses are not exaggerated. The wife will have to swear and prove by means of witnesses that she incurred the said expenses in the hope of being reimbursed.

Where someone maintains another's child, he or she shall only be entitled to an indemnity if the child has property or a father who had means at the time these expenses were incurred.

Section V

Of the Consequences of being unable or having Difficulties in maintaining a Wife

The wife has a discretionary right of demanding a revocable repudiation if her husband cannot meet the expenses of her maintenance, provided she did not know, when the marriage was contracted, that her husband had no means of subsistence. That right is lost, if she was aware of his position; except in the case where the husband, who was a beggar, ceases to beg, or is deprived of the alms he was in the habit of receiving, consummation having taken place.

If the husband cannot justify his poverty, the Ḳâḍi can order him either to provide for the wife's maintenance, or to separate himself by means of a revocable repudiation. If he does prove his indigence, the Ḳâḍi may grant him a delay varying from one day to two months, within which he must provide for his wife's maintenance. This delay may be extended in case of imprisonment or sickness. Once the delay has expired, the Ḳâḍi decrees the repudiation of the parties.

The husband is only bound to furnish sufficient food and clothes for the wife to live decently, whatever the wife's position may be.

After repudiation the husband shall only be entitled to take back his wife, if he finds the means to provide a proper allowance for her before the *ʿiddah* has expired.

Section VI

Of the Wife's Maintenance during the Husband's Absence. Of Disputes

A wife is entitled to demand of her husband, about to set out on a journey, either to give her, for the whole duration of his absence, an anticipatory allowance, or to give a power of attorney to another for her maintenance; the allowance to fall due at the same intervals at which the husband was in the habit of paying it.

If, during her husband's absence, the wife claims that her allowance has not been paid to her, the Ḳâḍi has the power of assigning to her a sum in proportion to the husband's property. She will have to make a sworn declaration supporting her claim.

If the husband has no personal property either in the nature of capital or loans, his house, or other immovable property may be sold. The Ḳâḍi is responsible that an exact inventory of the property sold is made. If on the husband's return it is proved that the sale was not justified, the sale is only then revocable if the house has undergone no alterations on the part of the new proprietor; even then the husband will have to choose between accepting the sale, or resuming possession of the house on the repayment of the sale price.

If, on the husband's return, disputes arise between the parties concerning the payment of the wife's allowance, then the wife's sworn statement shall be believed, provided she had brought her complaint before the Ḳâḍi, or other recognized authority. If this is not the case, the husband's sworn statement shall be preferred.

If disputes arise between the parties concerning the allowance allotted by a Ḳâḍi, since dead, to the wife, the statement which appears to be most likely shall be believed. If it is impossible to arrive at a conclusion, a new allowance must be fixed for the future and the customary allowance given for the past.

CHAPTER XII

MAINTENANCE OF SLAVES, &c., CUSTODY OF CHILDREN

SECTION I

OF THE MAINTENANCE OF SLAVES, ANIMALS, AND NEAR RELATIONS

IT is incumbent on a Believer to provide his slaves with food, to pasture or feed his cattle and other live stock, and to see that his trees are watered.

A slave is maintained by the master in whose service he is; but a *mukâtib* provides for himself.

If an owner is unable to provide food for his slaves and live stock, they must be sold or given away. A *umm-walad*, who cannot be sold, must be given away in marriage or enfranchised.

A slave under a *tadbîr* declaration or who is *istîlâd* shall be offered work as a servant about the house; if that is not possible the slave is to be enfranchised.

Slaves or animals that are overworked by their master must be sold.

Animals may be milked, but not to such an extent as would injure their young.

The Believer, if a free man, is bound to provide for his father and mother if they are indigent and whether they are Infidels or not. The parents may be required to prove that they are indigent. Similarly the Believer is bound also to provide for the slaves of his indigent parents. But he is in no way bound to provide for other of his father's wives than his own mother.

The Believer is not bound to provide for his stepfather, nor his grandparents; neither need he provide for his mother or her daughter if married to men in easy circumstances.

Relief for the parents is to be furnished by all the children collectively. There are three views as to the proportion of the share each child should provide. The generally accepted one is that the share is to be in proportion to the wealth of each child.

A father, who is free, must maintain his free son, who has no fortune or trade, until he has attained the age of puberty and intellectual development, and is in a position to provide for his own living. But if the son has property, or a trade by which he may live,

the father need provide nothing, unless he has made profits or speculated with property belonging to the son. A grown-up son who is afflicted with insanity, or is impotent, blind or sick, and unable to earn his daily bread, must be maintained by his father. The master of a female slave maintains his slave's children.

A daughter is maintained by her father until she begins to cohabit with a husband who has reached the age of puberty. If she is repudiated before she has reached puberty, her father must maintain her.

In the case of a person who has voluntarily ceased to receive relief from his father or son and has since been maintained by some third person who is not obliged to do so, the person whose duty it was to maintain him is thereby relieved from further responsibility; unless he is forced again to provide the relief owing to some judicial decree, or unless the relief, in the case of a child, for instance, was advanced by the third person as a loan and with the intention of making a claim for it later on.

The expense of maintaining a repudiated wife who is ill and was ill at the time the marriage was consummated must again be borne by her father. This, however, is not the case where a woman, who was married whilst young and healthy, is repudiated or becomes a widow and subsequently returns to her father, she being then over the age of puberty and capable of providing for herself without having to resort to begging; or where the woman's illness has come on again after puberty, either before or after repudiation, and the woman returns to her father in good health. If she, however, returns to her father whilst still under the age of puberty, he must maintain her.

A female slave under a *kitâbah* declaration of freedom, must provide for her children's maintenance, provided they too are included in the *kitâbah* and provided the father of these children is not included. For if the father has made another agreement, or is free, or if he is entitled to the benefit of the declaration together with the children and mother, he is obliged to provide for both mother and children. In both cases the master need not provide maintenance.

Section II

Of Nursing

A mother is obliged to nurse her child, whether she be living with her husband or revocably repudiated. She may claim no retribution for suckling her child. Gratuitous nursing of her child is, however, not obligatory on a woman of high birth, or on a woman irrevocably repudiated by her husband, unless the child refuses the breast of another woman, or the father has disappeared, or the child is without property.

A mother for whom the nursing of her child is obligatory, shall engage a wet nurse at her own expense if she is unable to nurse the child herself owing to her state of health or other good reason.

In the case of the high-born mother she may insist upon nursing her child herself, and may claim remuneration proportionate to her milk. This remuneration is to be paid by the father, or if he has no means, it is to be paid out of the child's property.

Section III

Of the Custody of Children

Sub-section 1. Of the order of precedence.

Ḥiḍânah consists in seeing that children are properly housed, fed, clothed and washed; these cares devolve chiefly upon women.

The mother has the right of custody of her male child until he reaches the age of puberty; of her female child until the consummation of her marriage.[1]

A slave mother has the same rights, even should her child be enfranchised and even though she be repudiated by her free husband.

It is the father's duty to watch over the moral education of his children, to correct them, to send them to school, or to a master or mistress who may instruct them. He must also see that his children are circumcised or excised; but it is the mother who must take charge of the nuptial ceremony in which a daughter is taken to her husband.

If the mother remarries, or is excused from taking care of her children, this duty becomes incumbent upon the children's relatives in the following order:—the children's maternal grandmother: the mother's maternal or paternal grandmother: the children's maternal aunt: the mother's maternal or paternal aunt: the children's paternal grandmother: the children's father: the children's sister: the children's paternal aunt or great-aunt: the father's maternal aunt or great-aunt.

If no ascendant can take charge of the child's first education, it is confided to a guardian.

Sub-section 2. Of the moral and pecuniary condition of persons who are entrusted with the education and care of children. Obliga-

[1] It is a mother's privilege to look after her children. Muḥammad has established this principle by an answer which tradition has brought down to us. A woman had just been repudiated by her husband, by whom she had a son. She took the child in her arms and went to the Prophet: 'Prophet of God,' she said, visibly affected, 'this child is my son, my womb is the vessel that contained him, my breasts are the vessels whence he fed, my garment forms the cover in which I hold him wrapped up. And his father has repudiated me, and wants to take away my child, he wants to separate me from my son.' 'To thee,' said the Prophet, 'belongs the right to keep that child, until thou marriest again, and hast consummated the marriage.' (Perron, II. p. 566.)

tions imposed when away travelling. Cessation and renewal of the right to educate a child. Maintenance.

A person entrusted with the education of a child must possess the following qualifications :—

(*a*) He or she must be in full possession of his or her faculties, must be neither cruel nor hard, etc.

(*b*) Must be able to look after the child, yet not too old; e.g., not over fifty.

(*c*) Must live in a house where the child in her charge may remain absolutely secure from seduction, licentiousness, or loss of property.

(*d*) Must be free from all immorality or vice, and from all infectious diseases.

(*e*) Must be honest in all his dealings with the child's property.

It is not indispensable that the person in charge of a child should be a Muhammadan. If it is to be feared that the child might be led astray, he shall be watched over by Muhammadans.

If the person entrusted with a child is a man, it must be ascertained that he has a family capable of taking care of the child.

A recently married woman shall not be entrusted with *ḥiḍânah*, since her duties as a bride might prevent her from giving all her attention to the child.

A free Muhammadan who has paternal authority over a child, either as father or guardian, may not travel beyond six *barîd* [1] without taking the child with him, even though the woman, to whose care the child was confided, refuses to follow the child. Similarly the woman who has charge of the child shall not go beyond six *barîd* [1] from the residence of the child's guardian.

This rule may be relaxed in case of urgent need; the woman in charge shall, however, always ask for the guardian's or father's consent.

When a woman has lost the right of looking after a child by reason of her marriage, that right does not revive after she has been repudiated or after her husband's death.

The amount to be spent by the child's father or guardian for maintenance is regulated by the Ḳâḍi.

[1] i.e., the interval between two stages.

CHAPTER XIII[1]

SALES (*BAI'*)

Ibn-'Arfa's definition. A sale is a contract by which one party transfers to the other proprietary rights in a thing for a price; these proprietary rights being other than mere use or enjoyment. In a more strict sense, a sale is a commutative contract, of which one equivalent consists in ready money and the other in some certain object which is not currency. A sale necessarily involves three elements: an agreement; the parties to the agreement; the object of sale, that is, the thing sold and the price.

Section I.

The Form and Results of an Agreement for Sale

1. A SALE is made perfect by the mere consent of the parties, even though such consent be tacit; as well as by the reciprocal delivery of the thing and the price. It may be concluded either by a positive stipulation, as 'will you sell that to me?' followed by an affirmative answer, or by the acceptance of an offer of purchase or sale.

2. If one of the parties has used a conditional or future expression, such as 'I will sell you this' or 'I will buy this from you at so much,' and then maintains that he did not intend to bind himself, his sworn statement shall be resorted to; if he refuses to make oath the contract remains obligatory.

3. The same distinction is to be made with regard to offers of sale or purchase made in a public market.

Section II

Of the Capacity of the Contracting Parties

4. In order to make a valid contract, the following conditions are necessary: (*a*) the parties must be in full possession of their faculties;

[1] Chaps. XIII to XXXIII have been taken from Seignette's *Code Musulman*, as being more accurate and concise than Perron. The numbering of rules as in Seignette's work has been retained, in order to facilitate easy reference to the Arabic and French texts as given in parallel columns in the *Code Musulman*. When the numbering is not consecutive, rules have been omitted as not of practical value.

(*b*) must have full capacity to contract [1] ; and (*c*) the absence of duress. Jurists differ as to want of judgment owing to drunkenness. Consent extorted by violence involves the return of the thing without restitution of price, except in the case where the State expropriates a functionary who betrays his trust.

Sub-section 1. Of relative incapacity.

5. Non-Muhammadan tributary subjects cannot acquire sacred objects, such as a book or a Muhammadan slave.

11. Every non-Muhammadan slave who is under age may be constrained to become a convert by means of blows and intimidation.

Section III.

Of the Subject-matter of Contracts of Sale

13. The subject-matter of every contract must be : (*a*) not ritually unclean ; (*b*) lawful ; and (*c*) of general utility. Thus the following cannot be the subject-matter of a contract : manure, rancid oil, forbidden meat, an animal on the point of dying, a dog used for hunting, a fugitive slave [2], a thing retained by force in the hands of a third person.

Sub-section 1. Sale of a thing belonging to another.

15. The sale of a pledge is subject to ratification by the pledger ; the sale of a thing belonging to another is subject to the ratification of the owner, provided the buyer knew that it belonged to him ; that of a slave who has committed a delict is subject to the ratification of him who suffered the damage.

Sub-section 2. Of sale of servitudes.

Section IV

Of Motives

22. The motive of every contract must be lawful in every respect ; every component part of the contract must be determined and its price ascertained. Thus, it would not suffice to stipulate for two slaves belonging to so and so, or for a pound of flesh of some sheep or other.

Sub-section 1. Of sales 'en bloc.'

25. It is permissible to contract a sale *en bloc* provided that : (*a*) the subject matter of the contract can be seen ; (*b*) its quantity calculated as a whole, though unknown in detail ; (*c*) the contracting parties have experience in dealings of this kind ; (*d*) the goods are placed on level ground ; (*e*) there are difficulties which do not allow

[1] i.e., fully emancipated and under no interdiction. Thus, the boy or girl under the age of puberty, the undischarged bankrupt, have not full capacity to contract a sale.

[2] Unless the owner cannot be traced ; cf., p. 269.

of the goods being weighed, measured or reckoned; and (*f*) they are not such as are commonly sold in detail, unless they be foodstuffs of very small value.

26. Unseen goods cannot be sold *en bloc*, even though the contract be to fill a given recipient, or to refill it a second time after emptying it, unless it refers to fresh fruit which it is customary to sell by the basket.

28. If it is found at the time when the contract was made that one of the contracting parties knew the actual quantity of the thing sold *en bloc*, the other party shall be entitled either to maintain or rescind the sale; but any declaration as to quantity made before the contract vitiates it entirely.

Sub-section 2. Of the sale of unseen goods.

30. *Res fungibiles* [1] may be sold by sample. They may also be sold undecorticated, or in bales, cases or packages, or by invoice (i.e. by description), or on inspection by the buyer prior to the contract, provided the thing has not altered since he inspected it.

31. In the absence of contrary proof the oath of the seller shall testify as to the truth of the description, the oath of the buyer as to the good tender of the cash paid, the oath of the vendor that the goods are in conformity with those agreed upon by the buyer.

34. In a sale of unseen goods the risks remain with the vendor until delivery, unless there is a stipulation to the contrary.

35. The transport of the goods is always at the expense of the buyer.

Sub-section 3. Of usury in exchange.[2]

36. Any profit or advantage gained or lost in the exchange of gold or silver, or in the exchange of foodstuffs is considered usury and, as such, prohibited. Foodstuffs, gold and silver can only be exchanged for their exact equivalents.

38. Payment in kind taken by a jeweller out of the metal entrusted to him, is considered usury and as such illegal.

53. Any advantage in a payment left to one of the parties is considered usury, unless it is gratuitous.

54. Thus, in the payment in cash of a sale price, it is lawful to give or to receive more than the weight or quantity agreed upon, provided that the excess or deficiency received is not compensated for by any usurious advantage gained in another way, as, for instance, by a higher rate of currency of the coins given in payment.[3]

[1] *Res fungibiles* is a term applied to things that can be replaced by equal quantities and qualities of the like kind, e.g., a bushel of wheat.

[2] The heading in Perron, III. p. 216, is as follows: Of simple exchange in contrast with an exchange effected for purposes of sale or barter.

[3] Thus where the sale price amounts to say £10, the vendor may allow a 10 per cent. discount, and thus only receive £9, or he may accommodate the

56. Adulterated goods shall be seized and given away in alms unless they were bought at their intrinsic value with no intention of fraudulently reselling them.

57. Are reputed fraudulent : the dressing of cotton goods, silks, etc. the debasing of metals, the insufflation of carcases, etc.

Sub-section 4. Of usury in the provision trade.[1]

58. Provisions or articles of food, the trading in which may give rise to profits reputed to be usurious, are those which constitute the daily subsistence of mankind and which can be preserved ; with regard to their being capable of being preserved different opinions exist.

59. Such are : wheat, barley and rye, forming one category ; oats, millet and maize, each forming a category.

Section II

Of Sales and Imperfect Obligations [2]

Sub-section 1. Effects of an illegal condition.

66. An illegal condition has the effect of rendering an obligation imperfect and consequently falls to be annulled, except in those cases indicated by the Law.

68. The Law prohibits all uncertain conditions, as where the price in a sale is to be fixed at a later date by the market-price, or where it is made subject to the decision of a third person.

71 Forbidden is the sale of the unborn offspring of slaves and animals.

72. Forbidden is any sale where one side of the contract consists in an agreement of maintenance for life.

74. The Law prohibits : an alternative condition that the price is to be so much for ready money or so much for credit ; or that this, or some other object is to be delivered, unless the two articles differ only as regards their good or bad qualities with resultant differing values. Such a condition is illegal, however, if one or both objects consist of foodstuffs, such as the fruit of a date palm, to be chosen from among many ; but the vendor may reserve at his choice one fifth of the trees in his garden.

buyer by agreeing to receive in payment, say 260 frs., or more than £10, provided that all idea of profit on the sterling exchange is eliminated.

[1] The dispositions contained in this sub-section have their origin in the following principle, as given in the *Sunnah* : ' Exchange ye wheat for wheat, barley for barley, dates for dates, salt for salt, in equal quantities from hand to hand. Whoever makes a profit on this traffic is guilty of usury ; but where foodstuffs are of different kinds, exchange them one for the other as ye choose.'

The Arabic term for usury is *ribâ*.

[2] i.e., sales that are perfect in their nature, but vitiated by some external circumstance. See Zeys, I. p. 134.

77. The Law forbids the following forms of novation[1]: (*a*) where the creditor discharges his debtor in consideration of the latter becoming his debtor for a new and larger debt payable at a later date: (*b*) the substitution of a new creditor or debtor: and (*c*) any change in the form, as where the lawful delay of three days in a *salam* agreement is exceeded.[2]

78. The Law prohibits all cash sales of debts owed by a succession, or owed by a person who is absent, or owed by someone who is present if the debt is contested.

79. The Law prohibits all promises of a sale of a debt with delivery of earnest-money, if made subject to the condition that he who has given earnest shall lose same, if he retracts his promise.

80. The Law prohibits all sales, as also all partitions of a succession, which would have the effect of separating a mother from her child, or even that of placing the one into the possession of the slave belonging to the master of the other, unless the mother consents, or the child is old enough to dispense with the mother's care. The slave woman's declaration shall establish the fact of her maternity; the contract shall be annulled if it does not transfer the property in both mother and child to one and the same master. It has, however, been held that in a gratuitous contract it is sufficient if mother and child are provisionally left together.

82. The Law forbids all conditions which would encroach upon proprietary rights in the thing sold, such as a clause purporting to prohibit re-sale.

88. At an auction any bid made by a third person, in concert with the vendor, without the intention of buying, and made with a view to deceive a buyer, shall annul the sale, and entails the restitution of the price and of the thing bought, or its value if it has perished.

89. In sales by auction it is lawful to keep away by means of gifts, promises or solicitations, some, but not all the bidders.

90. Town inhabitants are forbidden, even though they may be agents to that effect, to sell agrarian products on behalf of nomad Arabs, the penalty for which consists in the annulment of the sale, and bodily chastisement. Some commentators have extended this prohibition to the products brought by the villagers of the neighbourhood.[3] They are not forbidden to make purchases on behalf of these nomads.

[1] Novation here means any change in the form or in the parties to an obligation.

[2] See p. 171, rule 311.

[3] The term 'nomad Arabs' has now been generally extended to include all peasants who cannot be expected to know the current market rates for produce.

In Perron it is laid down that the sale subsists if the thing sold is still present, but Zeys (I. p. 138), probably more correctly states the Law when he explains that such a contract of sale is an imperfect one, and as such gives the seller the right of option of rescinding the contract. The 'agrarian products' appear to refer to market produce, such as butter, eggs, fruit, honey, etc.

91. It is forbidden [1] to buy on the roads or approaches to a town those provisions which are intended for the market supply; also in town to purchase by sample such provisions before they have reached their destination.

Once, however, such a sale is concluded it shall hold good.

92. Anyone living more than six miles away from a town, shall be allowed to buy for his personal use the provisions which are brought past his house.

Sub-section 2. Of questions of risk in imperfect obligations.

95. In all transactions of sale that are tainted with illegality, the risks pass to the buyer only on delivery.

If the thing perishes and there is a doubt as to whether the contract can be annulled, the sale shall be considered perfect, and the buyer must pay the price; if the contract is null and void, the buyer shall pay the actual value of the thing on the day of delivery, or if *res fungibiles*, he shall return things of the same nature.

99. A thing is considered to have perished, if, since the sale, it has been alienated or pledged or let by the buyer. This applies also to immovables (real property) and, moreover, the land sold cannot be returned if the buyer has dug a well, or has captured a water supply, or has put up any buildings, or if he has made new plantations or suppressed old ones, provided, however, such improvements are of considerable importance.

100. If the improvements occupy but one quarter of the land, the remainder shall be restored;—if less than one quarter, the whole of the land shall be restored, provided an indemnity be paid equal to the value of the improvements on the date of the rescission of the sale. This is the ruling of al-Mâzirî and Ibn-Maḥarraz.

Sub-section 3. Of usury in sales on credit.

103. Illegal are, owing to frequent abuses resulting from them, all schemes purporting to disguise a loan under the form of a sale, or all those leading to some usurious advantage, unless the latter be inconsiderable, as where security is obtained against small risks.

Sub-section 4. Of usury in purchases on commission.

Section III

Of Conditional Sales and Obligations

Sub-section 1. Of option by agreement.

127. The right of option can only result from a clause in the agreement.

138. It shall be presumed that the buyer in a transaction relating

[1] 'Under the penalty of seeing the vendor use his right of option,' is doubtless understood here.

to the sale of a slave or any other chattel renounces his right of option : if he subsequently frees that slave conditionally, or gives him or her in marriage, or uses her to satisfy his carnal desires, or if in the case of a chattel, he has it pawned, or hires it out, or has worked it up, or put it out for sale in the market, or if he has intentionally spoilt it. This also applies if he has bled the animal he has bought, or has investigated the genitals of the slave, but in this latter case, he may lawfully remove her clothes in order to examine her conformation.

Sub-section 2. Of lawful options.

160. Any object unfit for the use it was intended for in the agreement, may be returned.

Of vices which allow of a contract being rescinded. Actio redhibitoria.

163. Redhibitory vices are those so reputed by custom ; such as, in the case of slaves :—partial blindness, amputation, castration, abnormal suppression of the menses, etc ; the slave's father's, mother's or child's domicile being in the same locality, but not the domicile of the slave's brother or grandfather ; the bastardy of a slave.

165. In the case of animals the following are reputed to be redhibitory vices :—habitual stumbling, internal injury of the hoof, stubbornness, inability to carry an ordinary load.

168. Where a female slave declares that she has borne a child to her master, such declaration, although of no avail to her when her master, who denies his paternity, wishes to sell her, yet gives the buyer the right to rescind the contract ; and further obliges the latter, if he does not take advantage of his right, to declare the facts of the case to a fresh buyer, if he in his turn becomes the vendor of the slave.

169. To abstain from milking a cow prior to a sale, in order to enlarge the udder, or to soil a slave's clothes with ink in order to pass him off as a writer, are fraudulent devices, which entitle the buyer to rescind the contract ; he, the buyer, shall, however, be constrained to return with the said cow a certain quantity of the cattle feed mostly used locally, since the milk cannot be returned in nature.

Of breach of implied warranty and consequent rescission of contract.[1]

173. The right of rescission for breach of implied warranty in sales, by order of the judicial authority, does not exist ; neither does it exist in a sale of slaves by an heir on account of an estate, unless the buyer ignored the seller's position (as executor).

174. In all other sales the right of rescission for breach of implied warranty does not exist if the vendor has stipulated that he shall be exempt from warranting hidden faults, provided the thing sold has been for some time in his possession.

175. The vendor, however, is obliged to declare the defects of

[1] Corresponding to the *actio redhibitoria* in Roman Law.

which he is aware, describing them and making them known in all their detail.

176. The right of rescission does not exist, if the undisclosed defect has disappeared since the sale was effected, and if it is not of a nature to reappear.

177. Opinions differ as to whether the marriage of a slave can be considered a redhibitory vice ; or is the vice extinguished by the death or divorce of one party, or only by his death ? Or does it subsist in spite of either ?

178. A defect is covered by any act involving acceptance by the buyer, except in those cases where no depreciation of the object could result from the said act, as, for instance, the fact of living in a house that has been bought.

179. The buyer's acceptance can be presumed from his voluntary silence, unless he makes oath to the contrary within a short time.

180. The buyer of a horse is not presumed to have disclaimed his right of rescission for undisclosed defects by using the horse on a journey of paramount necessity, or riding it back to the seller.

181. If the vendor is absent, the buyer shall make a written statement, signed by witnesses, which contains his request to rescind the contract, and, if unable to find anyone to whom he may restore the object, he shall refer the case to the judge.

182. If the vendor is far away, and his return is expected, the judge shall allow him a delay, and again he may allow a delay, according to one jurist's view, where the place of his residence for the time being is unknown.

184. The judge shall decree the rescission of the sale if the buyer establishes the fact that it was concluded subject to warranty.

185. The right of rescission of contract for undisclosed defects is extinguished where, through the fault of the buyer, the thing has perished, or where, for example, a slave has recovered his liberty by some mode of manumission ; the buyer may, however, demand a reduction of the price proportional to the amount the thing had depreciated owing to its inherent vices before its loss.

186. If the buyer has pawned or pledged the thing bought, his remedy shall be in abeyance until the said pledge is redeemed ; if he has let it out on hire, then until expiration of the term ; if he has sold it, then until the second sale is rescinded, or until it has returned into his possession by way of repurchase, donation, or inheritance ; unless it has undergone additional deterioration.

187. No remedy is open to the buyer if he has resold the object to a third person, or to the seller at the same price.

192. In the following cases the vendor's good or bad faith must be taken into consideration :—(*a*) where the object has perished owing to vices known to him and not declared ; (*b*) where he has

bought back the object at a higher price ; (*c*) where he has stipulated that he is not to be held responsible for vices ignored by him ; (*d*) where he claims reimbursement for brokerage ; (*e*) if he demands redelivery of the returned object at the place of delivery ; if, however, the distance is considerable, redelivery cannot be demanded, even though the seller acted *bonâ fides*.

197. If the vendor has acted in bad faith, and the thing has perished from a concealed vice or from an accident consequent upon that vice, though indirectly so ; as, for example, where a slave, who is in the habit of running away, dies whilst fugitive ; the buyer, or the third person to whom he has sold the slave, can both sue for the whole price, without prejudice to the second buyer's remedy against his vendor.

200. It is necessary to distinguish between the case where the vendor omits to declare the most important side of the defect, and the case where the least important side of the vice is concealed. Should the vendor be held to pay the whole price or merely a sum proportional to what he has concealed ? Further, should one consider whether the circumstances which caused the loss of the object could have been perceived from the vendor's declarations ? On these points jurisprudence varies.

201. In case of a partial rescission, a corresponding part of the price shall be returned. If the price was stipulated for in kind, then a sum representing the value of that portion given back, shall be returned.

202. There can be no partial rescission involving the return of the greater part of the object sold, nor the return of one of two objects forming a pair, nor for a mother separated from her child.

203. In cases of judicial dispossession (eviction) from the greater part of a thing sold *en bloc*, the sale can only be rescinded for the whole.

205. Where one or several vendors have sold a thing to one or several buyers, or to them conjointly, each of the latter may sue (upon an implied warranty) any one of the former for his share, if the subject matter of the transaction can be resolved into separate shares.

Of presumptions.

206. As regards redhibitory vices existing prior to the sale, the vendor's statement shall be accepted until the contrary is proved.

Of delays prior to bringing an action on implied warranty.

215. In the case of an ordinary three days warranty, any vice which appears within that interval gives rise to an action on implied warranty, unless there be stipulations to the contrary.

Section IV

Of Delivery

Sub-section 1. Of risks in sales.

223. Where a sale is effected by measure, weight, or number, the things sold remain at the vendor's risk until they are measured, weighed, or counted.

224. The expenses of delivery are borne by the vendor.

225. The thing remains at the vendor's risk so long as it remains in its receptacle, even though the buyer has left the measuring to the vendor.

226. The delivery of immovables (reality) is effected by the vendor giving up possession (dispossessing himself); the delivery of movables (chattels) is effected in accordance with local custom.

227. In a perfect sale, the ownership of the thing, and the risks, pass to the buyer, by the mere consent of the parties, except where the vendor withholds the thing on account of non-payment, or where it has been seized by judicial decree; in these two cases the vendor's responsibility is on a par with that of a pledgee.

228. The vendor is equally responsible in the sale of unascertained things (i.e. things which have not been viewed) until delivery.

229. In case of contestations the payment of the price is primarily incumbent upon the buyer.

230. If the object perishes by pure accident whilst still at the vendor's risk, he is relieved from his obligation to deliver it.

Sub-section 2. Of the remedies in cases of judicial dispossession or deterioration.

231. If the vendor has caused the object to disappear or to deteriorate, or if a third person legally claims a share thereof, the buyer shall be entitled to rescind the sale.

232. Deterioration or partial dispossession gives to the buyer the same right of action as a redhibitory vice does.

233. If the vendor is dispossessed of the greater part of the subject matter constituting the sale, the buyer cannot insist upon the sale of the remainder unless the said subject matter consists of *res fungibiles*.

237. Where a certain quantity of corn, sold by the measure, perishes by fault of the vendor, he shall, nevertheless, be bound to furnish the quantity agreed upon; nor shall the buyer refuse acceptance. If the corn has perished owing to a third person's fault, the latter shall be bound to replace same, or if the exact quantity is unknown, to pay the value thereof, and the seller shall then be bound by the contract; the excess of the sum paid in compensation belongs to him. If the vendor cannot make up the quantity that he had sold, the buyer may rescind the contract as in the case of a partial dispossession.

Sub-section 3. Of transfer without delivery.

238. A thing can be sold, and the property therein transferred before it has come into one's possession.

239. There is an exception to this rule in the case of foodstuffs bought or exchanged.

240. Are considered bought or exchanged :—provisions allotted to a functionary, such as a magistrate, delivered to him either in measured rations, or as a quantity of milk being the produce of one particular cow.

241. No one can deliver a thing to himself, except a guardian on behalf of his pupil.

242. He who buys provisions wholesale, and he who obtains these provisions gratuitously, may transfer them before they have been delivered to him.

Sub-section 4. Of the power of revocation.

246. The person who buys foodstuffs, even by way of barter, may with the vendor's consent revoke the contract prior to delivery, even though the thing delivered in payment has undergone a change in value owing to the fluctuations of the market ; no revocation can, however, take place when the thing has suffered depreciation or has increased in value owing to some change that has come over its substance, such as, for example, the increased leanness or fatness of animals, but not of female slaves.

247. Revocation cannot take place unless it is agreed that both parties shall make reciprocal restitution of the identical thing which they delivered to each other, except as regards legal tender, which the seller can always return in the shape of coins of the same value, even though he may still be in possession of the identical ones received.

248. Except in the case of a sale of foodstuffs, or of recovery of an alienated heritage, or of a transfer of a bargain for a profit, all revocations involve a second sale.

Sub-section 5. Of the transfer of bargains.

Of gratuitous transfer.

252. Every buyer may gratuitously transfer the bargain made by him : he can do so although the transferee is not acquainted with the object or price of the bargain.

253. If the transferee, after having agreed to the object, does not agree to the price, he may refuse to accept the transfer.

254. The following transactions must be closed within the shortest possible time, but the order of the transactions given below represents the varying length of delay accorded by the Law for the completion of each transaction ; exchange being that one in which the shortest delay is allowed.

1. Exchange.
2. Revocation of a sale of food-stuffs.

3. Gratuitous transfer of a sale.
4. Revocation of the sale of movables.
5. Compensation.
6. Transfer of a debt.
7. Novation. (Substitution.)

Of non-gratuitous transfers.

255. It is lawful, though the Law is not in favour of contracts of this description, to transfer, for a premium or abatement, a bargain or even a contract of exchange, if in the latter case the transferee binds himself to furnish a specified object of the same kind and value as the one stipulated for.[1]

Sub-section 6. *Accessorium sequitur suum principale.* (Accessories follow the nature of their principal.)

267.—The sale of land is presumed to include that of the constructions (buildings) and plantations thereon. Conversely, the sale of a construction or of a tree is presumed to comprise the land upon which these were situated.

268. The sale of land is presumed to include the seeds that have not yet begun to grow, the things that are buried in the ground and so forgotten by the vendor ; but not standing crops.

269. Unless there is a special clause in the contract, the sale of trees is not presumed to include their fruit, if the greater part thereof had already begun to set at the time of the sale ; nor does the sale of a slave include his peculium, (savings from exceptional industry) ; nor again does the sale of standing crops include the aftermath.

271. The sale of a house includes fixtures, such as :—doors, windows, the mill together with the grindstones, steps or stairs built into the house ; with regard to those fixtures that do not actually form part of the buildings, opinions differ considerably.

Sub-section 7. Of the sale of standing crops.

273. Crops and fruits other than those enclosed in shell or rind may be sold so soon as they have begun to ripen.

274. It is permissible, however, to sell all kinds of fruit and crops prior to the stage of maturity, provided that they are sold along with the trees or the land as the case may be, or that they are sold to the profit of the actual owner of the trees or land.

[1] An example of this would seem to be the following :—
A concludes a bargain with B, in which he agrees to barter a sheep of a certain kind and value against B's gown. Finding that he can make a certain quick profit by transferring the bargain, or finding that he cannot conveniently make delivery of a sheep, A transfers his bargain with B to C, in consideration of, in the first case, a premium of 100 cowries, or, in the second case, of an abatement of 100 cowries paid by him to C. The transfer is valid if C then delivers to B a sheep of the kind and value stipulated for in the original bargain.

275. Young crops or fruit that are still unripe may be sold, if it is necessary for the vendor to do so, provided there is no fear of the usage degenerating into a public danger; this can only be done subject to immediate removal. In the absence of a clause to that effect, such a sale is prohibited, and more rigorously so, if it was stipulated that the buyer might await the maturity of the crop.

Sub-section 8. Of presumptions.

296. If contentions should arise with regard to the nature of the stipulated price and in the absence of proof, each party shall have to make oath, and the contract shall be annulled, and the object returned to the vendor, or, if it has perished, the value thereof on the day of the sale.

297. Where the contention concerns the amount of the price, the quantity of the subject-matter, or the terms or mode of the obligation (such as the day on which a payment becomes due), or a pledge or a security, then, in the absence of proof, both contracting parties shall be called upon to make oath, and the contract may be annulled at the discretion of the Ḳâḍi. If both parties make oath the result will be the same as where both refuse to do so.

298. If the subject-matter has perished, then, in the absence of contrary proof, the buyer's statement as to the compass and mode of his obligation shall be relied upon, provided his allegations appear to be reasonable, and provided he makes oath.

299. If one of the contracting parties pretends to ignore or to have forgotten the price that was stipulated, the other party's word shall be accepted, provided it appears to be the truth, and provided he makes oath.

300. The same rule applies where one party has died and is represented by his heirs.

301. In cases where both parties are called upon to make oath, the vendor shall swear first, and each must swear as to the truth of his allegations, and the falsity of those brought forward by the opposing party.

302. If the contention concerns the length of the delay accorded within which payment is to be made, then, unless there is proof to the contrary, the statement of the party for the benefit of whom the stipulation was made shall be accepted, provided he makes oath.

303. If a contention arises either with reference to the payment of the price, or the delivery of the goods, it shall be presumed that the one or the other is due until the contrary is proved, irrespective of the importance of the sale; unless a contrary presumption results from an established custom, as in sales of meat or vegetables which are to be taken away.

304. If the goods have not been taken away, or if the buyer pretends

to have first removed them and then paid, there is no presumption in his favour.

305. If, on the other hand, he pretends to have paid in advance, and to have subsequently removed the goods, does the presumption in his favour exist, or does it only exist where custom renders his allegations probable ? There are several views on the subject.

306. If the buyer acknowledges that he owes the price, he shall be presumed to have received the goods until the contrary is proved ; he may, however, call upon the vendor to make oath within ten days following the contract.

307. The same right belongs to the vendor, in spite of any extra-judicial declaration by which he is said to have discharged the buyer from paying the price.

310. If a contention arises with regard to the place of delivery, preference shall, in the first instance, be given to the statement of the party who demands delivery at the place where the contract was made ; in the second instance the vendor's statement shall be decisive ; if, however both parties make improbable allegations, each party shall becalled upon to make oath. If these oaths are contradictory, or if both parties refuse to swear, then, in default of other proof, the contract shall be annulled ; as for instance, where it is agreed to deliver a thing in a certain country without specifying the locality. Moreover, if a town has been designated, delivery must be effected in the market place, and if there is no market place, then in whichever part of the town the buyer may choose.

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CHAPTER XIV

SALES (*SALAM*)[1]

Ibn-ʿArfa's definition. *Salam* is a unilateral[2] agreement involving consideration which creates a personal obligation to give a certain palpable thing of a different kind to the thing received and which is not money.

Section I

Of Essentials necessary to the Validity of the Agreement: (*a*) Advance of Purchase Money[3]; (*b*) Obligations of the Debtor; (*c*) Delay within which delivery must be made.

Sub-section 1. Of advances.

311. IT is essential that the delivery of the thing, the transfer of which creates the debtor's obligation, should be made immediately and in its entirety; a delay of three days is, however, admissible, and may be stipulated for in the contract.

Sub-section 2. Of the debtor's obligations.

320. It is essential that the advance and the obligation resulting therefrom should not both have reference to foodstuffs, nor to the precious metals, nor to things of the same kind, or differing only in quality and quantity, unless they differ also as to the way in which they are intended to be used.[4]

324. A *salam* contract would amount to a contract of *mutuum* (loan for use)[5] if its object were a loan repayable in the form of things of the same nature as the loan.

[1] *Salam* means delivery; by this it is indicated that the price of the sale is delivered to the vendor without immediate exchange by him. (Perron, III. p. 579.)

[2] A unilateral contract arises when the party with whom an engagement is made makes no express agreement on his part.

[3] In cash or kind subject to rule 320.

[4] Here is seen the constant care of the jurists to individualise contracts. If the advance and the obligation related to *res non fungibiles*, the contract would be an exchange; if to *res fungibiles*, a *mutuum* loan; if to specie, an usurious exchange. (Zeys, I. p. 186.)

[5] See Appendix to the chapter, p. 172. Khalîl has made *mutuum* depend upon *salam*, for the two forms of contract offer many analogies, though the latter is not one which to-day would be made use of.

Sub-section 4. Determination of the object of the obligation, that is, of the nature of the security.

337. The agreement known as *salam* gives the creditor only a personal right of action against the debtor.

Section II

Of the Carrying into effect of the Agreement.

350. The creditor may legally receive his due prior to the date fixed, but may receive neither more nor less. If the agreement concerns foodstuffs, the creditor may accept delivery in a different place to that agreed upon, but only on the date agreed upon, and without claiming an indemnity.

351. The creditor, or in default of him, the Ḳâḍi, is bound to accept delivery of the thing due, on the date and at the place stipulated.

354. The creditor may legally accept as payment a thing differing in kind to the one agreed upon, provided it be one that can be legally sold before its coming into the vendor's possession, and provided the thing offered as payment can legally be exchanged for the one due, and can be legally stipulated for in an agreement as the equivalent for the loan ; thus, he cannot accept a thing of a different kind to the one due, whether the latter consists in foodstuffs or in the meat of an animal of the same kind as the one offered as payment, or where the thing offered in payment consists of gold, the advance having consisted in coin.[1]

356. The debtor is not obliged to pay in a different place to the one agreed upon, even though the transport of the object does not involve expense.

APPENDIX

Section I

Of *Mutuum* [2]

Ibn-ʿArfa's definition : Mutuum is a loan of movables that must be repaid at a fixed date in things of the same kind, and is made in the sole interest of the borrower, creating an unilateral and personal obligation.

357. All things that may form the subject-matter of a *salam* agreement [3] can also form the subject-matter of *mutuum*,[4] excepting the case of a female slave, who is not within the prohibited degrees of relationship to the borrower.

[1] cf., rule 453, p. 179.

[2] *Mutuum*, a loan whereby the absolute property in the thing lent passes to the borrower (it being for consumption), and he is bound to restore, not the same thing, but an equivalent in things of the same kind.

[3] i.e., generally speaking, everything that can be described with precision, both as to quality and quantity. (Zeys, I. p. 188.)

[4] These gratuitous loans are strongly insisted upon in the Korân.

358. Any female slave lent to a person, who is not within the prohibited degrees of relationship, shall be returned at once or paid for at the estimated price, as would be the case in a sale that is void owing to the object having perished whilst in the buyer's hands.

359. Any present made by the debtor to his creditor is usurious, and as such, illegal; or similarly, a present made by a dormant partner to his *ʿâmil*[1]; or by a litigant to a Ḳâḍi[2] or other influential person, although the said present may be disguised under the form of a fictitious sale. An exception is made in favour of customary presents, or of those which originate in an entirely new cause.

369. Any profit to be made by the lender is considered usury; for example, where the lender stipulates for fresh provisions in return for bad ones; or for flour or biscuit in a different locality to the place of delivery; or for baker's bread in return for coarse bread; or for payment in a distant locality by means of a bill of exchange, or of a considerable sum involving great transport expenses, except in the case of general danger; or for the repayment in the same locality of a sum which it is dangerous to keep. These advantages will, however, be considered lawful, if it follows from the circumstances that the interests of the borrower alone have in the first place been considered.

361. Thus, an acre of wheat may be given for the borrower to harvest, thrash, and then return an equal quantity, provided the saving of labour thus obtained is insignificant.

362. (*a*) In *mutuum* the debtor becomes owner of the thing lent. (*b*) The creditor (lender) may only demand payment after expiration of the agreed term, or in default of agreement, after expiration of the term fixed by custom. (*c*) The lender need not accept repayment in any other place than the one agreed to, unless it is made in specie (cash).

Section II

Of Mutual Compensation

Ibn-ʿArfa's definition. Mutual compensation arises where both plaintiff and defendant release each other of a reciprocal debt consisting of things of similar nature.

363. Compensation is always permissible and must be accorded where both debts consist in an equal sum of money payable in specie, whether the said debts have fallen due or not.

364. If both sums are payable in specie of different standard though of the same nature, or in different specie, mutual compensation can only take place when they have become due. The same rule applies where the sums are unequal, each one being the price of a sale, or where both debts consist of foodstuffs due in payment of a loan of foodstuffs.

[1] See p. 227, notes 1 and 2.

[2] See p. 280, note 1.

365. No compensation can, however, be effected where an obligation has on both sides arisen from a sale or exchange of foodstuffs, even though these were of similar kind, quality and quantity.

367. If neither debt consists of foodstuffs nor of a sum of money, mutual compensation can always be effected if the things owed on either side are of the same quality and kind; or if the things of different kind are to fall due on the same date, or have both, or one of them, fallen due; or if the things are of the same kind, but of different quality, provided they are to be paid on the same date.

Except in the cases specified above, no mutual compensation can take place.

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CHAPTER XV

SECURITY (*RAHN*)[1]

SECTION I

OF THE NATURE OF TRANSACTIONS INVOLVING THE GIVING OF SECURITY

SECTION II

OF ILLEGAL CONDITIONS IN TRANSACTIONS INVOLVING THE GIVING OF SECURITY AND OF CIRCUMSTANCES UNDER WHICH THE CREDITOR IS DEPRIVED OF HIS RIGHTS

SECTION III

OF CASES IN WHICH THE SECURITY IS TRANSFERRED TO A THIRD PERSON

SECTION IV

OF THE NATURAL INCREMENTS WHICH FORM, OR DO NOT FORM, AN INTEGRAL PART OF THE SECURITY

SECTION V

OF THE ENJOYMENT OF THE SECURITY

SECTION VI

OF THE SALE OF THE SECURITY

SECTION VII

OF THE CREDITOR'S CLAIMS FOR EXPENSES INCURRED IN CONNECTION WITH THE SECURITY

[1] *Rahn* is a contract chiefly referring to procedure. The security is considered as a witness to the existence of the debt, as also to its relative amount. (Zeys, I. p. 205.) As the procedure in *rahn* does not appear to be known in West Africa, only the section headings are here given. See also chap. XX. p. 189.

Section VIII
Of Risks

Section IX
Of the noxal Surrender of a Slave in Pawn
(*Noxalis deditio*)

Section X
Of the Indivisibility of the Security

Section XI
Of Contentions which may arise in Transactions involving the giving of Security

CHAPTER XVI

BANKRUPTCY (*FALAS*) [1]

Ibn-ʿArfa's definition : Bankruptcy is the judicially decreed forfeiture of a debtor's property in favour of his creditors, which arises owing to his inability to discharge his obligations.

Section I

Of the Stage that precedes Adjudication in Bankruptcy

432. EVERY creditor can prevent his debtor, whose debts are greater than his assets, from gratuitously alienating anything ; from leaving on a journey, if his debt is to fall due during his absence ; from paying another creditor before his debt to the latter has fallen due ; from making to certain creditors a general transfer of his property ; and, according to Lakhmi and other jurists, from acknowledging debts towards suspected persons.

433. The creditor cannot object to the debtor transferring a part of his assets or obtaining securities.

Section II

Of Adjudication in Bankruptcy

435. A debtor shall be adjudged bankrupt in his presence or even in his absence, unless known to be solvent. The said adjudication shall be effected upon the request of one of the creditors, where default is made in the payment of a debt which has fallen due exceeding the known assets, or where such payment would leave uncovered debts that have not yet fallen due. Adjudication may be made notwithstanding opposition on the part of the other creditors.

Section III

Effects of Declaring a Debtor bankrupt

Sub-section 1. Of the legal incapacity of a bankrupt.

436. Adjudication deprives the bankrupt of the right of managing his

[1] The word *Falas* would be better rendered by 'insolvency judicially declared.' The term 'bankruptcy' has however been used for the sake of brevity. A *muflis*, bankrupt, is one who is reduced to complete indigence because he owes more than he possesses. (Zeys, I. p. 101.)

property but not from exercising his personal rights, such as repudiating, divorcing, exercising his right of retaliation, manumitting the mother of his child, or giving her her *peculium* if it be small.

437. Adjudication renders the bankrupt's debts demandable even though they have not become due, just in the same way as if he had died; even rent for an unexpired tenancy can be demanded without leaving the bankrupt, who was absent and returns solvent, the possibility of recovering the benefit of his term.

439. The bankrupt's formal admissions made in Court or within a s ort time shall be accepted, if the creditors themselves have no other proof than the debtor's admissions. In the contrary case, these admissions shall be of no avail.

440. The bankrupt shall be permitted to designate those chattels which are in his charge by way of deposit, and the depositors shall have to prove the identity of the several chattels.

442. After determination of the bankruptcy proceedings, the bankrupt recovers his legal capacity for the time being; but on his acquiring new property it may be seized in favour of his unpaid creditors.

443. The debtor may either have voluntarily parted with his assets in favour of his creditors who shall have sold them or divided them up, or he may have been judicially deprived of his assets; in either case, if he contracts new debts, the new creditors shall be placed on a par with old creditors only as regards assets the debtor may have obtained by way of inheritance or as the result of causes pre-existing to his first bankruptcy, as for example a claim for blood-money.

Sub-section 2. Of the sale of the bankrupt's property.

444. The bankrupt's chattels shall be sold in his presence under reserve of option to be exercised within three days.[1] Even his books of science and religion and his Friday garments shall be sold if their value is at all considerable.

445. The Law varies with regard to a workman's tools.

446. A slave under a *tadbîr* declaration and other forms of future manumission may be hired out for the benefit of the creditors; not so the slave-mother of the bankrupt's child.

447. A bankrupt cannot be obliged to work or to borrow, to exercise his right of pre-emption or to give up his right to the exercise of retaliation and accept blood-money (*diyah*), to deprive his slave under any form of future manumission of his *peculium*, or to revoke a gift made to his child.

[1] This may mean that a bankrupt is allowed three days after his adjudication in which to come to terms with his creditors; or it may mean that the option of delay is at the discretion of the creditors in order to allow them to take advantage of changes in market prices. Perron's translation (IV. p. 16) is no clearer than Seignette's on this point.

448. The sale of animals shall be proceeded with within the shortest delay, and within two months or so immovables shall be sold.

449. The proceeds of the sale shall be distributed *pro rata* among the inscribed creditors, without their having to prove the non-existence of other creditors.

450. The distribution of the bankrupt's assets after realization can only be delayed in the event of the bankrupt's death or if he is reputed to have other debts.

451. Debts owed in kind shall be estimated on the day of distribution and the respective shares used for the purchase of similar things, without there being a possibility for the creditor to be indemnified by his co-creditors owing to the rise or fall in the market-price.

453. A creditor may agree to receive his share in money if there is no legal bar to such a course as indicated in rule 354.

454. The claims of a bankrupt's wife with regard to her dower rank with those of the creditors, just as they do in the case of her husband's death ; similarly she can claim the expenses she may have incurred for his maintenance, but not for that of his child by her.

456. Where heirs to a succession encumbered with debts or known by them to be so, shall have nevertheless paid some of the creditors, these heirs shall conjointly be answerable to any other creditor who subsequently puts in a claim ; each heir's liability to be proportional to his share of the succession. The creditor can, for the balance that may still be due, put in a claim against the creditors who have been paid, and obtain a redistribution of the assets.

459. The creditors shall for a period varying according to circumstances leave a bankrupt in possession of some food and of sufficient money with which to meet his most urgent needs. They shall allow him and each member of his family one working garment.

Sub-section 3. Of arrest for debt.

461. A bankrupt whose assets are unknown shall be imprisoned until they are notified, unless he requests to be set free on procuring bail ; in which case, should he fail to appear, the surety shall pay for him even though his insolvency is but subsequently established.

462. The debtor who appears to possess means but who pretends to be insolvent, or who promises to pay requesting a delay of one day, shall be imprisoned unless he furnishes a surety.

463. If bail is forthcoming for the sum owed, the debtor shall be accorded a delay within which to sell his property, unless he is known to be in possession of ready money ; jurisprudence varies as to the right of causing him to make oath concerning this, but in any case a judge may lay hands on the debtor and have him imprisoned, if he knows that the debtor is in possession of ready money.

464. If witnesses declare that the bankrupt has neither apparent

nor hidden property, the debtor shall make oath and promise to pay so soon as he shall have the means, whereupon all proceedings shall be stayed.

465. The prosecutor shall have to make oath if the bankrupt maintains that the former knows him to be insolvent.

466. Is the request to effect a search in the bankrupt's house admissible ? Jurisprudence is at variance on this point.

467. In case of contradiction, the evidence of the witness who affirms solvency and proves concealment of assets shall be preferred.

468. The bankrupt whose means remain doubtful, shall be released from prison after a time fixed in accordance with the importance of the insolvency and the position of the bankrupt.

469. Women can be imprisoned under safeguard of a reliable matron or care of a married woman whose husband enjoys the reputation of untainted morality.

470. The patron can be imprisoned by request of the slave he has freed ; the grandfather by request of his grandson, the son by request of his father, but not the father by request of his son.

471. Again, a son cannot call upon his father to make oath, unless the father first calls upon the son to make oath, or unless the oath concerns the interests of a third party.

472. Two near relatives, such as two brothers or a married couple, shall not be separated in prison if the accommodation is sufficient.

473. Prisoners for debt shall be permitted to be looked after by a servant and to be visited by their friends, but not by their wives.

474. The bankrupt shall leave the prison in order to submit to the bodily chastisement he may have been sentenced to ; he shall also be released if he goes mad, subject to his being imprisoned again if he recovers ; or in order to visit his father, mother, child or very near relative in case of grave illness, subject to his producing someone to answer for his person ; but he shall not be released in order to perform his Friday prayers, nor in order to join in a *jihâd*.

Sub-section 4. Of privileged or secured creditors.

475. In bankruptcy causes, but not in successions, the unpaid vendor of a definite object, even though it may be coined specie or a runaway slave, may exercise an option either to take back the definite object sold by him to the debtor, provided it is still amongst the assets, or to take his stand amongst the other creditors in the distribution of the assets. This right of withdrawal of the definite object may be exercised only provided : (*a*) the other creditors have not agreed to indemnify him, the vendor of the definite object ; (*b*) that it is feasible ; and (*c*) that it has not changed its form, as in the case of wheat converted into flour.

476. Again, servants such as herdsmen or shopmen have no prior

claim as against the other creditors with respect to their wages; nor can a buyer claim priority with regard to the object he has returned owing to a redhibitory vice, though he may have originally taken such object in payment of a debt.

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CHAPTER XVII

LEGAL INCAPACITY [1]

Ibn-Arfa's definition. Legal incapacity creates an impediment to the exercise of full rights of property.[2]

SECTION I

OF THE LEGAL INCAPACITY [3] OF MINORS AND PRODIGALS.

492. THE legal capacity of a lunatic is modified until such time as he recovers his reason ; that of a minor, until he attain his majority.

493. An infant reaches his majority at puberty

SECTION II

OF THE LEGAL INCAPACITY OF SLAVES

513. Every slave is subject to legal incapacity unless he is given power to do business on behalf of his master [4] ; he then becomes an agent vested with full powers, though his authority may be limited to certain transactions only.

514. The trading-slave may in the interest of his master's business : conceal a debt or part of one ; grant a delay or give a repast ; lend or receive partnership funds ; dispose of things he may have obtained gratuitously ; and, according to an argument contained in the *Mudawwanah*, he may accept a gift in spite of his master's opposition. A slave not in charge of a business may accept a present without his master's assent.

515. A trading-slave may be declared bankrupt under the same

[1] Defective legal capacity would be a more correct heading to the chapter.

[2] As Zeys points out (I. p. 99) Ibn 'Arfa's definition is not a juristic one, for incapacity relates as much to the disposal of one's person as to one's property.

Incapacity arises from any of the following causes : infancy, lunacy, prodigality, slavery, bankruptcy, sickness and, in the case of women, marriage. It will here be only necessary to treat of incapacity arising from the status of slavery. The sole modification in the full legal capacity of a married woman lies in the fact that she cannot dispose at one time of more than one third of her property without her husband's consent, see p. 148, note 1.

[3] In Arabic : *ḥajar as-safîh.* (Macdonald, p. 354.)

[4] Such a slave is hereafter called a trading-slave ; cf., the 'trade-boys' of Southern Nigeria.

conditions as a free man; his creditor's claims shall be satisfied out of the property in his possession, which may even be held to include a slave who has borne him a child and presents given to him.

516. If a trading-slave has no creditors, he is in the same position as any other slave.

517. A slave who is an Unbeliever cannot be put in charge of an unlawful business, such as the wine-trade, by his Muhammadan master. Query if he trades for himself? there are two views on the subject.

CHAPTER XVIII

COMPROMISE [1]

Ibn-ʿArfa's definition. Compromise consists in the surrender of a right or the discontinuance of a suit for a consideration.

[1] In Arabic, *sulḥ* (Macdonald, p. 354). Compromise is a most meritorious form of contract founded on the aphorism in the Korân, Sura IV (p. 68) : 'for a reconciliation is better than a separation,' which, though it refers primarily to marriage, has been generalized in its application" (Zeys, I. p. 225). As compromise is a contract which theoretically has no proper legal form in itself, but partakes of the nature of sale, hire or gift, as the case may be, it does not appear necessary to render the chapter, which, moreover, refers chiefly to compromise in the matter of successions and the paying of blood-money in cases of homicide.

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CHAPTER XIX

TRANSFER OF DEBTS OR DELEGATION [1]

Definition.[2] Delegation consists in discharge from a debt in consideration of the assignment of a similar debt due to the original debtor.

548. THE essential conditions of the contract are : the co-operation of the original debtor (transferor) and of his creditor (transferee) and the existence of a valid debt which constitutes the object of the transfer.[3]

549. The contract shall nevertheless be valid, if the transferor whilst stipulating his discharge, informs the transferee that there is no debt owing to him. Shall the transferee have a right of action in case the transferor's debtor dies or becomes insolvent ? There are two views on the subject.[4]

550. The following are the conditions requisite for a valid transfer of debt.

(*a*) Discharge of the transferor's obligation must directly result from the contract.

(*b*) The debt to be extinguished must have fallen due, even though it consists in the price to be paid by a slave for his freedom ; but it is not necessary that the debt owed to the transferor should have fallen due.

(*c*) Both debts must consist in objects of the same kind, equal in quantity and quality[5]; there are several opinions, however, as to the varying fineness of coins.

[1] The Arabic term is *ḥawâlah*. (Macdonald, p. 354.)

[2] Zeys' definition is here given and not that from Seignette. In an eulogistic note on that late scholar, Zeys reminds the reader that Seignette confined himself to a simple translation of Khalîl's work, without the use of commentaries (Zeys, I. p. 234).

[3] The transferor's debtor's consent is not necessary, provided there is no known enmity between him and the transferee. (Perron, IV. p. 115.) Without the transferor's debtor's consent the transaction becomes that form of novation known in Roman Law as *expromissio*, whilst delegation requires the consent of the third party.

[4] Rule 549 is a literal translation, but as it stands, the meaning is not clear, and Perron (IV. p. 116) does not elucidate. Presumably the contract is valid though no longer as a compromise, but as a surety, in which case the transferee would retain his right of action against the transferor. Cf., Zeys, I. p. 235.

[5] If they were not the contract would be usurious.

(*d*) The two debts must not consist of foodstuffs which have been purchased.

551. The transferor need not disclose the state of solvency of his debtor.

552. A transferred debt passes to the transferee's risks, even where the new debtor is bankrupt or disputes the debt, unless the transferor alone was aware of the said bankruptcy at the time of the assignment.

553. The transferor may be called upon to make oath if it can be presumed that he knew of the bankruptcy of his debtor.

554. According to Ibn al-Ḳâsim, where a vendor has transferred the price of a sale and such sale is rescinded owing to eviction or redhibitory vice, the transfer remains valid with regard to the transferee ; the contrary view prevails, however, among modern jurists.

555. The transferor's statement as to the existence of the debt to be assigned shall be accepted until the contrary is proved ; as also the statement of the transferee as to the existence of the transfer, in case the transferor should deny that the said assignment was perfect, maintaining that the transaction was merely either one constituting the transferee his agent to collect his debt or else a loan of the money owed to him by his debtor.

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CHAPTER XX

OF SURETYSHIP OR GUARANTY (*ḌAMÂN*)

Ibn-ʿArfa's definition. Suretyship is an accessory obligation consisting either in the satisfaction of a principal obligation, without extinguishing it as regards the debtor, or consisting in searching for the debtor and bringing him to his creditor.

SECTION I

OF THE GUARANTY OF A DEBT

Sub-section 1. Of the nature and extent of a guaranty.

556. GUARANTY is a contract by which a third person constitutes himself liable for the debts of another. May constitute themselves surety :—

557. Any person who is in full enjoyment of his civil rights, such as the *statu liber*, or the slave put in charge of a business with his master's consent, or a married woman, or sick person, up to the value of the disposable third of their property.

559. It is permissible to constitute oneself surety for guaranty already given by the principal debtor.

560. A guaranty may be given for a debt not yet due and may be paid at once, provided it is one which can be legally extinguished before it has fallen due ; or, conversely, a guaranty may be given for a debt which has fallen due, and an extension of the term may be obtained provided the debtor is apparently solvent, or was lacking in sufficient funds to meet the debt when it fell due ; if, however, he has the means to discharge part of the debt, it would be illegal to stipulate such an extension by means of a contract of suretyship.

561. A guaranty may only be given for a valid debt or for one which is liable to become valid, such as a conditional obligation to do a certain act ; but, for instance, a slave's obligation cannot be guaranteed.

563. A surety can withdraw so long as the loan has not been made.

564. But the surety cannot withdraw even prior to the creditor making oath as to the existence of the debt, if he has made the con-

tract of suretyship conditional upon the creditor swearing as to the existence of the debt.

565. The debt must be such that it can be discharged by the surety, it need not however be otherwise determined as to its size or nature.

Sub-section 2. Of a surety's remedies.

569. A surety can sue his principal for what he has paid either in money or in kind, subject to his proving such payment.

570. He may come to an agreement with the creditors on those terms on which the debtor might lawfully make a compromise, and can have recourse to the debtor for the value of the object given in discharge of the debt up to the value of the amount owed.

Sub-section 3. Discharge of a surety.

571. Every cause that operates the principal debtor's discharge, also operates that of the surety; but not *vice versa*.

572. So soon as a surety dies, payment of the debt that he has guaranteed may be made chargeable upon his estate, even though the term is unexpired and the debtor is present and solvent; subject to the right of the surety's heirs to sue the debtor upon the expiration of the term. The debt, even though the term be unexpired, becomes demandable upon the debtor's death.

Sub-section 4. Of distraint.

573. A surety cannot be sued so long as the debtor is present and solvent; provided the distraining of the debtor's goods is not too slow and arduous a process.

574. The surety's statement as to the debtor's solvency shall be accepted by the creditor until the contrary is proved.

Sub-section 5.

575. A creditor may advantageously stipulate that the sureties shall be jointly and severally liable; on the other hand a surety may stipulate that the debtor's goods shall be distrained upon prior to the creditor having recourse to the surety under all circumstances, or with the exception of that of death. Further, the guarantor may stipulate to be only answerable for the debtor's appearance, and in this case the creditor may stipulate that his statement as to the debtor's non-appearance shall be undisputed until the contrary is proved.

576. A surety may demand of the creditor a formal discharge upon the expiration of the term; he cannot demand of the debtor that the payment shall pass through his hands.

577. If the debtor pays his debt through the surety by way of discharge, the surety remains responsible for such payment; not so, however, if the payment has been entrusted to him by way of deposit.

578. A simple prorogation of the term granted by the creditor to

the principal debtor does not discharge the surety if the debtor was insolvent.

579. If the debtor was solvent, the prorogation of the term shall only then discharge the surety if he had opposed it or if he had been unaware of it ; but he shall remain liable in both cases if the creditor makes oath that he did not intend to discharge him by prolonging the debtor's term.

580. A prorogation granted to the surety may be taken advantage of by the debtor, provided the creditor does not make oath that he intended the contrary.

581. All circumstances that render the principal obligation null and void, also annul the guaranty. A guaranty shall further be null and void if the surety makes a stipulation to his advantage, except in the case where a creditor grants his debtor a reduction of his debt with a view to inducing the latter to go surety for him ; but the words 'be surety for me and I will go surety for you' would not be a valid contract.

582. Several persons, however, may constitute themselves sureties jointly and severally liable for a thing bought, sold or borrowed by them in common.

Sub-section 6. Of apportionment.

583. Where several persons constitute themselves sureties for one debtor and for one and the same debt, the creditor can only claim from each co-surety the amount each has given guaranty for, unless they have constituted themselves jointly and severally liable, as where, for instance, they have become sureties in succession.

Sub-section 7 Of the right of action of co-sureties

Section II

Of Guaranty for a Debtor's Appearance.

587. The object of a contract of guaranty may be the debtor himself.

588. A husband can annul any such contract of guaranty made by his wife.

589. A surety shall be discharged if he delivers up the debtor, even though he be a prisoner in gaol, or if he causes the debtor to put in an appearance in good time.

590. If no particular stipulation has been made, the surety need not cause the debtor to appear before a court of law, or at any one place in preference to another ; provided there is a magistrate in the locality where he is bound to appear.

591. A surety is not responsible for the debtor's insolvency.

592. In default of the surety causing the debtor to appear in good

time, judgment shall be given against him to pay in lieu of the debtor; he shall, however, be granted a delay of one day or so, if the debtor is but a short distance away.

593. A surety shall not be discharged by the debtor's appearance after judgment has been given against him; however, the surety can claim from the creditor the amount he has paid into Court, if he can prove that the debtor was insolvent or was dead before the judgment of the Court was pronounced.

Section III

Of a Quest as the Object of a Contract of Suretyship.

594. The object of a contract of suretyship may consist in the search for a person, including one who has incurred the punishment of retaliation. Thus, a surety may take upon himself the responsibility of searching for the debtor, he may stipulate his pecuniary irresponsibility or expressly confine his obligation to procuring the debtor's appearance and to searching for him to the best of his ability.

595. The surety shall have to make oath that he has used all diligence, and, if negligent, he may be sentenced to a pecuniary fine or even to corporal punishment should he have facilitated the debtor's escape.

596. According to Ibn-Yûnus, a guaranty shall be presumed to be a pecuniary one, if the surety has used any of the following expressions: 'I give guaranty for—I constitute myself surety—I will answer for—I certify—I authorize—I accept—it is for me—it is at my expense' and other analogous expressions, unless the contrary is proved.

CHAPTER XXI

COMMERCIAL ASSOCIATION OR PARTNERSHIP [1]

Ibn-Arfa's definition: A partnership, in the widest sense of the term, exists where property is held in common between two or more co-proprietors. More particularly, however, it is a contract by which a person alienates an undivided share of his property, in return for an undivided share of the property of another, each having a right to administer the whole.[2]

Section I

General Dispositions [3]

599. A PARTNERSHIP is a contract by which each partner is authorized and is enabled to empower another to administer the common property.

600. Partnership can only exist as between persons under no legal disabilities.

601. Partnership is made perfect by the mere consent of the parties, given either tacitly in accordance with local custom, or expressly by a stipulation followed by a conformable answer.

602. The shares contributed towards the common concern may both consist in gold, or both in silver coin having current value, or each in gold and silver, or one in money, the other in something capable of being estimated, or both of a thing capable of being estimated, but the estimation thereof shall be effected on the day the contract is made, not on the day on which the thing perishes, if it should so happen, excepting the case where the partnership is annulled *ex post facto.*

603. The property held in common remains at the risk of the partnership if the partners have amalgamated their contributed shares,

[1] The Arabic term is *shirkah* (Macdonald, p. 354); cf., *societas* in Roman Law.

[2] The definition of *societas* in Roman Law is as follows: Partnership (*societas*) is a contract in which two or more persons agree to combine their property, or one contributes property and another labour, with the object of sharing among themselves the gains of this common undertaking.

[3] Though a partnership may of course consist of more than two persons, still, throughout this chapter, Khalîl refers to it as if it only consisted of two persons. This is probably the case in actual practice amongst Eastern people.

even though the latter can be materially distinguished ; in the contrary case, each share remains at the risk of its respective owner. If one of the shares perishes, any purchases made with the remaining share go to the account of the partnership, and the partner whose share has perished must refund half the price to his co-partner.

604. Nevertheless, it has been held that the profits or losses of the said purchases shall only then be apportioned if the purchasing partner knew of the loss of his partner's share. Again, it has been held that the profits and losses shall always be divided, except where the purchasing partner proves that it was his intention to buy for himself only.

605. Even though the share of one of the partners has not been actually delivered, the partnership shall nevertheless exist, provided the share is to be delivered within a short delay, and that transactions are only to be commenced when the said share is available.

606. Those partnerships are illegal wherein one share consists of gold bullion, the other of money, or both consist of foodstuffs, even though the foodstuffs may be of the same kind.[1]

SECTION II

OF COMMERCIAL ASSOCIATIONS WITH DISCRETIONARY POWERS

607. In default of special stipulations as to the mode of administration, the members of a partnership are presumed to have discretionary powers, even though the partnership's object consists in a specific enterprise.

608. A clause by which one of the partners should reserve for himself the right to trade on his own account by means of a separate fund, does not vitiate the contract.

609. Either partner is entitled to make presents on behalf of the partnership, provided they are made with a view to obtaining customers or are of a trifling nature, as, for instance, the giving of charity to a beggar or the loan of a tool.

610. Either partner may without his co-partner's consent : commission a hawker ; provide funds for another enterprise ; make a deposit, subject to his being held responsible if made for no valid reason ; rescind a bargain ; transfer a bargain to a third person ; refuse to rescind a contract, even against the wish of his co-partner ; formally admit a partnership-debt in favour of unsuspected persons ; sell on credit.

611. He may not, without his co-partner's assent, buy on credit ; liberate a slave either conditionally or for money paid ; put a slave in charge of a business ; or associate a third person in the partnership.

[1] For in this case each of the partners would be alienating foodstuffs before he had actually taken possession of them, which is prohibited by rule 239, p. 167.

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612. Shall be considered as on his personal account : any dormant partnership of which he accepts the administration ; any loan contracted by him even in the interest of the partnership, if contracted without the co-partner's consent ; any profit or loss made by him by illegally trading with a deposit, without his associate being an accomplice.

613. Each partner is the legal agent of the other ; consequently an *actio redhibitoria* may be brought against the partner who is present, even though he did not take part in the sale ; the action can, however, be adjourned until the absent partner returns, provided he is expected to arrive within a few days.

614. Each partner's share in the profits and losses shall be in proportion to the funds each has provided ; any contrary stipulation is illegal, and each partner must account to the other.

615. After determination of the contract, however, each one is at liberty to make to the other any present, advance of funds, etc., he chooses.

Sections III

Of Presumptions

616. Until the contrary is proved, a partner's declaration that he has lost some object or suffered any other loss shall be undisputed. Similarly, his statement that some object fit for his personal use has been taken by him for his own account, shall be accepted.

617. In case of contestations, either partner shall be presumed to be entitled to an equal share.

Section IV

Of Limited Partnerships (*Shirkat al-ʿinân*)

625. If it has been stipulated that one partner shall not be allowed to do anything without his co-partner, such a partnership is said to be one with limited powers.

627. Where one of the partners is commissioned by the other to buy some definite object on behalf of the partnership, they may agree between themselves that the buyer shall advance the funds for the purpose, provided the commissioning partner has not stipulated that he will trade with the thing thus to be bought before he has refunded the buyer his share of the purchase money. If no such stipulation has been made and the transaction has been carried out by the buyer advancing the funds, he has no lien upon the thing bought with his advance. If, however, a contrary stipulation has been made, he may retain the thing as a pledge.

628. The funds may be advanced by the other party (i.e., by the partner who does not execute the purchase), provided the loan is gratui-

tous, and not made owing to the particular commercial ability of the partner entrusted with the purchase.[1]

Section V

Of Labour Associations (*Shirkat al-ʿabdân* [2])

630. It is permissible for two or more persons to associate themselves for the exercise of a profession or handicraft ; provided the partnership exists for the exercise of one profession or of two branches depending upon one industry, the ordinary profits of which are practically equal, with a view to lending mutual assistance even though the associates work separately.

638. According to one interpretation of the *Mudawwanah*, the stock of tools may be provided by each partner or by one of the two subject to hire ; according to the other view the tools must be owned by the association or hired by the latter at common expense.

633. Again, an association may be formed for the working of a mine or lode, for instance ; but the right of working the mine is not transmissible to heirs and can only be conceded by the head of the State.

634. Any payment received or engagement entered upon by one of the associates for some work done or to be done binds the other, and the payment remains at their risk even after dissolution of the association.

635. Interruptions of work caused by sickness or absence are presumed to compensate each other provided they do not last more than about two days ; but a longer interruption must be taken into account.

636. Any contrary stipulation, as well as the holding of a greatly predominant share in the stock of tools by one of the associates, is illegal ; but must the interruption of the two days be omitted in striking accounts upon the dissolution of the partnership ? Opinions differ on this subject.

Section VI

Of Illegal Partnerships

637. Any stipulation involving a mutual guaranty made with the object of buying on credit and dividing the profits on re-sale is illegal, and renders null and void any agreement depending thereon.

638. An agreement by which a well-known tradesman concedes to an obscure tradesman the right to use his name in return for a share in the profits is also illegal.

639. An association in which one partner provides a mill, the

[1] For this would be usury. Always the same anti-economic preoccupations, as Zeys remarks. (I. p. 263.)

[2] Lit., association of bodies. (Zeys, I. p. 266.)

other a site, and the third an animal to work the mill, with a view to sharing the profits in common, is illegal; unless each partner's contributed share is equal and the income gained by the common enterprise is to be distributed in equal thirds.

640. If the owner of the animal alone is to provide the labour, the profits of the enterprise belong to him entirely, subject to his paying a hiring price to the other two partners for their respective shares.

Section VII

Of Servitudes dependent upon Co-proprietorship

641. Any co-proprietor of indivisible property is legally bound to share in the expenses of upkeep or to sell his share.[1]

650. Any new building that encroaches upon the public way shall be suppressed, even though it causes no harm.

651. Tradesmen may, however, be authorized to expose their goods for sale on the footpaths, provided they do not hinder circulation.

652. He who comes first has the first right.

653. Any new aperture made in a wall giving access to another person's property shall be suppressed.

654. Are prohibited: all establishments which might be a nuisance to the neighbourhood, either owing to smoke, as from a chimney, or owing to their smell, as, for example, that of a tannery, or again owing to the dust raised by depositing forage or corn in front of a house.

655. Similarly no one may undertake any works against his neighbour's wall which might deteriorate the same, nor may he build a stable against that wall, or open a shop opposite the entrance to another's house.

656. Anyone is entitled to claim from his neighbour that he shall cut down branches which have a deteriorating effect upon his wall, unless, according to certain authors, the branches existed before the wall was put up.

657. The Law does not prohibit the interception of a neighbour's light by new buildings and works; nor again the interception of the sun or wind, unless the intended site is to be used for thrashing corn.

658. The Law in no way interferes with the raising (higher) of buildings; nor will it intervene in the case of noises produced by many voices, or those caused by workmen in the exercise of their profession, as, for example, fullers when fulling cloth.

660. If a road is not open to public circulation, it belongs in common to all proprietors bordering on it; these proprietors may only effect such apertures that do not give direct access on to their neighbour's houses.

661. Anyone may, if necessary, climb up his date palm, provided

[1] i.e., he can be legally constrained. (Zeys, I. p. 270.)

he previously informs the neighbour into whose house he might obtain a view.

662. It is a moral obligation incumbent upon everyone: to allow his neighbour to place beams in the thickness of the wall separating the two houses, to show kindness towards him in allowing him to draw water or to make a door; such a permission may however be withdrawn.

Section VIII

Of Rural Associations

664. A rural association may be cancelled at any party's pleasure prior to seed time.

665. The contract[1] must be exempt from any illegal clause[2] affecting the tenancy.

666. Each associate's share in the profits is to be proportional to his contribution to the common concern, with the exception of any bonuses agreed to after the contract.

667. If the seeds are to be provided by each associate, they are to be blended, leastways in the ground.

668. If they have not been blended, the seeds that do not germinate shall not be taken into account, and the associate who, knowing their quality, shall have defrauded his partner, must reimburse half the seeds he has furnished, and the crop shall be equally divided.

669. Again, it may be agreed that each one shall provide half of everything that is necessary,[3] or that one shall furnish all the seeds, the other the labour, or that one shall furnish the land and either all the seeds or part thereof, provided the share in the crop attributed to him who provides the labour be not proportionately inferior to his contribution in seeds.

[1]The contract is supposed to be between two persons, one furnishing the land, the other the labour. (Zeys, I. p. 277.)

[2] See pp. 246, 247.

[3] Zeys and Sidi Saïd in their *Recueil d'actes et de jugements*, p. 184, give the form of such a contract, as follows:

Praise be to God!

Before the Assessors X and Y there appear A and B, both endowed with full legal capacity. They request the Assessors to take note that they have entered into a contract of rural association in order to cultivate the farm known as . . . during the coming winter; one half the farm to be under wheat and one half under barley. The parties have further contracted each to contribute one half towards the expenses of buying the seed; towards the labour, whether for tillage or harvest; towards all necessary farm implements; towards the rent of the farm; as well as towards all and every expenditure to be incurred up to and inclusive of the thrashing of the harvest. The parties will have a right, each in equal shares, to all the produce of the farm which God may grant them, according to the terms of the present contract, after paying out the share of the *khammâs* (i.e., the actual cultivator).

The parties presented themselves in Court at one and the same time, and accepted the clauses above enumerated, of which we have taken note.

670. It may be agreed that one partner shall furnish everything except labour,[1] provided there exists a stipulation to the effect that the parties intend forming a partnership and not merely an agreement for the hire of labour.[2] There are different opinions as regards the validity of a contract which is silent on that point.

671. It is illegal to ignore the letting value of the land when the contributed shares are equal, or, according to another view, when the partner who provides the labour also furnishes land of little value.

672. If the contract should be annulled, each one having provided his share of labour, the crop shall be equally divided between the two partners, subject to each one rendering account to the other of the value of half the seeds or half the rent.

673. Where one partner alone has been entrusted with the labour, in addition, may be, to his furnishing either the seeds, or land, or both ; or where each partner has provided his share of the seeds or land, but not of the labour ; the crops shall under all circumstances belong to him who provided the labour, subject to his rendering an account to his partners.

[1] This form of contract, known as *khamsat*, is very common in Algeria.

[2] Which would be unlawful, seeing that it would be in consideration of an undetermined share in the produce.

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CHAPTER XXII

OF AGENCY [1]

Ibn-ʿArfa's definition : Agency arises where one person authorizes another to replace him in the exercise of civil rights.

Section I

Of the Nature of Agency

674. An agent may be entrusted with all acts which can be done by a representative, such as concluding or rescinding a contract, collecting a sum due, assigning a debt or discharging a debtor, even though the amount of the debt be unknown to all three ; or again making the pilgrimage.

675. It is permissible to appoint an agent to act as one's representative in an action, even without the opposing party's consent. This, however, is not the case if one has already put in an appearance at two or three hearings, unless a valid excuse be forthcoming, as that of having to make a necessary journey, the necessity for which must be supported by an oath, and the agent then appointed cannot be recalled nor may he be allowed to renounce the agency.

676. An agent may not make any formal admission unless he has full powers or special powers conferred upon him to that effect ; but the opposing side may oblige the principal to confer those powers.

677. The order given to an agent to acknowledge a certain specified debt amounts to an admission.

678. The taking of an oath cannot be delegated to an agent, nor can an agent be appointed with a view to doing some illegal or blameworthy act.

679. The nature of the agency must be defined in the customary terms ; merely giving a power without further indication is insufficient.

680. An agent must be either general, and in this case, all his acts of good administration shall be valid, and even others if it has been so agreed ; except : the principal's divorce, the consent to the marriage of his virgin daughter, the sale of his house or that of his slave. Or he may be a special agent to do a particular thing, and in

[1] In Arabic : *wakâlah*. (Macdonald, p. 354.)

this case his powers are limited by his instructions, and he is bound to conform to them according to local custom and may not exceed them in any way.

681. The appointment of a person as an agent for a sale involves the right to sue for the price and to receive the same; again the appointment of an agent for a purchase involves a right to take delivery and, if necessary, to avail himself of the *actio redhibitoria*, except where a definite object is concerned which has been designated beforehand by the principal.

Section II

Of an Agent's Obligations

682. As between an agent and third persons, the former is responsible for the thing to be sold or bought and for the price, unless he has clearly expressed that he did not intend to bind himself, as where he should say: 'I am sent by so and so, in order that you may sell to him . . . .' It is however insufficient if he says: '. . . in order to buy.'

683. An agent is responsible for a breach of warranty in the thing sold, unless the buyer has been informed that he (the vendor) was acting simply as an agent.

684. An agent may only accept legal tender by way of payment, although nothing has been said on the subject, and he can only buy such things as may suit his principal, except, certain authors say, where his powers have been limited as to the price; if he is in no way limited, he must conform to the current market price both in purchasing and selling; otherwise his principal need not ratify his transactions. Similarly, he may not sell anything for small coin, except those things usually paid for in that manner owing to their small value.

685. Again, an agent may not exchange gold coin he has received for silver coin unless the purchase to be made is usually made by means of silver coin.

686. Further, an agent is bound to comply with his principal's instructions, concerning either the object to be bought or the time and place of the purchase or sale, and he must neither sell at a lower nor buy at a much higher price than the limits that were fixed; a digression of five per cent shall, however, be tolerated, and his statement as to the surplus paid within those limits shall be accepted, even though he may already have delivered the object, provided only a short time has elapsed.

687. If the agent does not comply with his instructions, the thing bought remains at his charge in case the principal refuses to accept it.

688. This is also the case if the thing bought is tainted with a redhibitory vice, unless it is of insignificant gravity or unless the thing has been bought at a reduced price.

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689. Similarly, the principal has the option either of rescinding the sale made contrarily to his instructions or of ratifying same ; this also applies to the case where foodstuffs have been exchanged for foodstuffs of the same kind. Rescission may, however, be opposed if the agent has agreed to pay the difference.

690. The principal is bound to ratify a sale or purchase made by his agent under more favourable conditions than the price fixed, or where the agent whose instructions were to pay cash has bought on credit and paid subsequently, or vice versa, or where having been commissioned to buy a sheep for one *dînâr*, he has bought two for the same sum and it is impossible to cancel the contract ; in the contrary case the principal may refuse to accept the second sheep.

691. The same rule also applies where an agent has obtained security for a *salam* agreement or the delivery of a pledge ; the pledge remains, however, at his risks until the principal has had notice and has accepted it.

694. It is not permissible to constitute a Christian, a Jew or an enemy of a debtor, as an agent to sell, buy or receive on one's behalf.

695. No agent may sell to himself goods entrusted to him for sale, nor may he sell them to a person under his guardianship ; he may, however sell them to his wife[1] or to his trading-slave provided no fraud attaches to the transaction.

697. An agent may not appoint a substitute or assistant without being authorized to do so, except in the case where it is not befitting for him to carry out the transaction personally ; or where the operation of selling or buying involves more than he alone can cope with ; the agent's revocation, however, does not necessitate that of the substitute.

701. The payment of a principal's debt by his agent on his behalf, is made at the agent's risks if he has not obtained a receipt.

703. A special agent's statement concerning the loss of an object he acknowledges to have received on behalf of his principal, shall be accepted ; but the principal's debtor, who maintains that he has paid the debt to the agent, will have to prove the fact.

704. The principal remains the vendor's debtor so long as the latter has not received the purchase money ; the loss of a definite object, however, placed in an agent's hands for him to exchange annuls the contract, if the said loss takes place prior to delivery.

706. Where two agents have been appointed, each can act independently of the other, provided they have not received instructions to the contrary.

707. If both the principal and the agent have independently of each other sold the same object, the first sale in point of time shall stand provided the subsequent sale was not followed by immediate delivery

[1] For in Muhammadan Law it is only the persons of the spouses that are in common, not their personalties. (Zeys, II. p. 14.)

708. A principal may demand delivery of the object stipulated for by his agent in a *salam* agreement, subject to his proving the existence of the contract.

Section III

Of Presumptions in Agency

709. The principal's statements concerning the order given to, or the *modus operandi* to be employed by his agent shall be accepted, until the contrary is proved; except in the case where a contention arises as to the thing the agent was commissioned to buy (subject to the latter making oath); or as to the price fixed by the principal. In this case the agent's statement shall be accepted, if it appears to be the most reasonable, even though the thing has perished or undergone a change; this would also be the case if the object still exists and the principal refuses to make oath.

710. Case I: An agent is commissioned to buy a female slave; he sends one to his principal without giving an explanation; the principal cohabits with her, and subsequently the agent brings him a second one. 'This,' he says, 'is your slave; the other one is mine, I merely entrusted her to your care.' It has been held that the agent is entitled to take back the first slave, subject to his making oath; unless her status has changed owing to pregnancy or manumission, in which case the agent must prove his allegations (i.e., that she was left with the principal merely by way of deposit), and the second slave shall be allotted to the principal.

711. Case II: The principal has fixed a maximum price: the agent after having sent him the slave, declares that he has exceeded the maximum. It has been held that the principal is entitled either to accept her for the price paid by the agent or to refuse acceptance, provided the slave has not undergone a change in her status; if her status has changed the principal is merely bound to pay the price fixed by him.

Section IV

Determination of Agency

715. An agency is determined by the principal's death, provided the agent has had notice thereof. If this is not the case, there are two opinions on the subject:

716. According to one school, the agent's authority ceases from the moment his powers are revoked by his principal; according to the other so soon as he has been informed of the said revocation.

717. Does the acceptance of an agency bind the agent under all circumstances, or only if the agent is to receive a salary, and if so, is the said agency to be considered a contract for the hire of labour or a conditional agreement? Views differ on this subject.

CHAPTER XXIII

ADMISSIONS [1]

Ibn-Arfa's definition: An admission is a declaration which, if held to be the truth, only binds the person who made it or had it made by his agent.

Section I

Of the Necessary Conditions for Valid Admissions

718. THE admission of a person capable of effecting the transaction in question, made in favour of another, shall bind the former; provided the said transaction is lawful, and provided the person in whose favour the declaration is made is blameless and does not deny the *bona fides* of the transaction.

719. Thus a slave's admission shall be valid, except in a civil case. In all cases a dumb person's admission by signs shall be valid.

720. Similarly an admission made by a sick person shall be valid even where such an admission is made for the benefit of a distant relation, or of a friend who has nursed him, or for the benefit of a person who has no successory rights or whose rights are still uncertain, and that, although he may have a direct descendant.

Section II

Of the Form of Admissions

725. The words: 'I owe;' 'I am responsible for'; 'I have'; 'I have received from you'; constitute an admission.

Section III

Of the Divisibility of an Admission

Section IV

Of Legal Presumptions in Admissions

746. Where a debtor has been discharged upon the admission of his creditor from any debt or obligation that may be owing, such discharge being given without reserve, the debtor is entirely freed, even from being prosecuted for a crime or delict.

[1] In Arabic: *iḳrar.* (Macdonald p. 354.) Admissions may be either judicial or extra-judicial.

747. Any subsequent claim of the creditor, though supported by documentary proof, shall not be admitted, unless it is proved that the debt was contracted after the discharge had been given.

748. The discharge given for a thing the debtor has 'with him' (i.e. at his house) merely covers those things the debtor may be in possession of by way of deposit, but does not cover any debts owing to the person making the admission.

CHAPTER XXIV

ADMISSIONS OF PATERNITY [1]

749. ONLY the father's declaration establishes his child's paternity ; he may, however, admit the paternity of a child whose filiation is uncertain and who may reasonably be attributed to him as being his child, taking into account the difference of age and local customs.

754. A slave bought by his father after having been acknowledged by him, is free by reason of the sale.

756. Where before dying a man says concerning the children of one of his slaves : 'One of the two is mine' ; the younger child shall be entirely freed.

757. If the children are of different mothers the drawing of lots shall decide which one is to be freed.

[1] In Arabic : *istilḥâḳ*. (Zeys, II. p. 28.)

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CHAPTER XXV

BAILMENT [1]

Ibn-'Arfa's definition: Bailment is a contract in which one person delivers movables to another with the sole object that he shall take care of them.

Section I

Of the Nature of the Contract

767. THE contract of bailment is a form of agency in which one person entrusts another with goods in order that the latter shall take care of them.

Section II

Of Cases in which the Risks are at the Bailee's Charge

768. A bailee is responsible for an accident occasioned by the fall of some object on to the thing bailed; but not for that caused by necessary transport.

769. The object deposited is at the risks of the bailee:

(*a*) Where it is mixed with others, unless this was done to facilitate preservation, or where corn is mixed with corn of a similar kind, or where *drachmae* are mixed with *dînâr*: in this case a partial loss shall be borne proportionately by each bailor, provided it is impossible to distinguish the property of each individual.

(*b*) If he uses the object deposited.

(*c*) If he takes it away with him on a journey, when he might have left it in safe custody; his responsibility ceases so soon as he brings it back.

770. The Law prohibits an insolvent bailee from using the object deposited, whatever may be its nature; the Law also prohibits a solvent bailee from using the object deposited, if it consists of a definite object. Again, the Law is not favourable to one who uses a deposit consisting of money or *res fungibiles*, with the object of trading for instance; but the profits, nevertheless, belong to the bailee.

[1] In Arabic: *adâ'*, cf., *depositum miserabile* in Roman Law. (Zeys, II. p. 35.) Bailment is a very common form of contract in all countries where banking is not commonly resorted to.

771. The bailee's responsibility is extinguished so soon as the object deposited is put back in its place, except where the Law forbade his using it. He is, however, no longer responsible, even in that case, if the bailor had authorized him or had said to him : 'If you want it, take it.' In all cases, he merely has to answer for what he has removed.

773. The risks are at the charge of the bailee if he loses the object deposited by forgetting it at the place where it was entrusted to his care ; or taking it with him to the baths ; or by leaving his house and taking it away with him in the belief that it was his own property. He shall, however, not be held responsible if the object falls out of the coat-sleeve he may have left it in, nor shall he answer for unforeseen accidents.

774. The risks are at the bailee's charge if he has entrusted the object deposited with him to any other person but his wife or slave, even though he was obliged to undertake a journey. Moreover, the said wife or slave must be accustomed to the taking care of deposits. He may, however, be relieved from responsibility in the case where some recent occurrence has diminished the safety of his house, or if, being on the point of leaving for a journey, or having already left when the object was deposited with him, it was impossible for him to restore the object to the bailor. In any case, he shall have to support by witnesses the excuse brought forward.

775.[1] The bailee's responsibility ceases so soon as he has lawfully handed over the object to some third person, but on his return he must at once claim the deposit from the second bailee.

776. The risks are at the bailee's charge during the transport of the object if he sends it to the bailor by a messenger. The risks are also at his charge where the deposit was the female of any animal and he has caused her to be covered without permission.

777. The risks are at the bailee's charge if he denies the existence of the trust ; but shall he, after having denied it, be permitted to prove that he has restored the object entrusted ? There are several views on the subject.

778. The risks are at the bailee's charge, if he dies without having informed his heirs of the trust and the object is not found in the succession ; unless the deposit was made ten years back or more.

779. The bailor is entitled to take back the object so found provided it bears some inscription made by him or the deceased bailee, establishing that he is the owner thereof.

780. The risks are at the bailee's charge ; (*a*) if the entrusted object is lost by *force majeure* owing to his fault ; (*b*) if the messenger who was to bring the object to the bailor dies on the way ; and (*c*) if

[1] Summarized from Perron, (IV. pp. 323, 324) ; Seignette's translation being unintelligible.

the clothes or animal entrusted to him have been used by him. Should, however, the use be established by his admissions only, his statement that the value has in no way depreciated shall be accepted.

781. The risks are at the bailee's charge, if he delivers the thing entrusted to his care to a third person, alleging that the bailor ordered him to do so whilst the bailor denies it on oath. Unless the bailee can prove his allegation, he remains responsible. If the bailor refuses to make oath, the bailee may do so and he shall be discharged without prejudice to the owner's (bailor's) right of action against the third person.

Section III

Of Contentions

782. If the person to whom a sum has been delivered maintains that he received it as a gift (e.g. as alms), whilst the person, who has sent the said sum, declares that it was given to the former by way of *depositum*, the messenger entrusted with the delivery of the sum shall be called upon to testify as to the true nature of the remittance.

783. The bailee's statement that he has delivered the deposit, either to the bailor's heirs or to the addressee who denies having received it, or to the bailor himself, shall not be accepted, if the bailor can produce witnesses to prove the contrary.

784. The bailee's declaration that the deposit has been lost shall be accepted, even should he allege that he is ignorant whether the deposit perished or was lost. But should his *bona fides* be suspected, he shall have to make oath ; if he refuses to make oath the bailor shall be called upon to swear.

785. A messenger may stipulate that he shall not be bound to give proof of having made delivery to the addressee.

786. The bailee is responsible if, after having refused to return the object entrusted to him, he alleges that the said object had perished before it was demanded of him. He is also responsible, if he admits, without a valid excuse, that the deposit was lost since he was finally summoned to deliver it, unless he affirms his ignorance as to whether it was lost before or after the demand.

787. He is again responsible if, having received the deposit without any witness being present, he refuses to return it otherwise than in the presence of the Ḳâḍi or his representative. His responsibility ceases, however, if, on being finally summoned, he declares that the loss took place many years previously, and, in the hope of finding it again, he had refrained from informing the owner of the loss, even though he was living in the same country. The preceding dispositions are indicated in matters concerning dormant partnerships.

788. No person is permitted to indemnify himself out of a thing entrusted to him by way of deposit for any debt owed him by the

bailor, even though the bailee may have previously suffered in a similar manner at the hands of the bailor.

789. In bailment, no salary is due to the bailee, but only rent for storage.

790. The contract can be rescinded by either bailor or bailee.

CHAPTER XXVI

BAILMENT (*COMMODATUM*)[1] OR GRATUITOUS LOANS FOR USE

Ibn-Arfa's definition: Commodatum is a contract by which one party procures to the other the temporary and gratuitous enjoyment of a thing.[2]

SECTION I

OF THE NATURE OF THE CONTRACT

795. THE Law sanctions and favourably regards the contract by which a person, having full legal capacity and who possesses and has the enjoyment of an object, delivers that object to another, in order that the latter shall make some determined and permissible use of it.

796. It is not permissible to lend a Muhammadan slave to an Unbeliever; nor a girl to a man for his sexual pleasures; nor may a female slave be lent as a servant to a man, if the relationship between them is not one that excludes the possibility of cohabitation.[3]

797. The loan of foodstuffs or money would be a *mutuum* loan.[4]

798. The mode in which a contract for a loan for use is concluded varies with local custom. No special forms or formulas are prescribed; thus, mere signs may be sufficient.

799. The following agreement: 'Lend me your servant and I will assist you with mine,' is a valid contract for hire of labour.

SECTION II

OF THE BORROWER'S OBLIGATION.

800. Unless the borrower can prove *force majeure* he is responsible

[1] It is important to remember that this chapter only deals with loans for use. A loan involving interest is prohibited in Muhammadan Law.

The loan for use is considered a meritorious action in the eyes of God. 'Any service rendered,' says the Prophet, 'is a contribution towards pious works.' The Arabic term for *commodatum* is *'ariyyah*.

[2] Abdur Rahim (p. 318) defines a commodate loan as the giving by a person of a thing to another person without receiving anything in exchange, intending that the latter should enjoy the usufruct. The person who enjoys the use of the thing holds it in trust (*amânât*) for the lender.

[3] Neither may the Korân, nor any law book, nor arms and ammunition be sold or lent to a Christian. (Zeys, I. p. 115; II. p. 45.)

[4] See p. 172.

for the loss of the loan (by way of *commodatum*), if the said loan is one that can be hidden from view, e.g. clothes.

801. If the object lent is one which cannot be hidden from view, the loss falls on the lender, in spite of any stipulation to the contrary.

802. If the loan is of such a kind as is liable to deterioration, by the action of worms for instance, the borrower shall be called upon to make oath that it did not perish by reason of his fault or negligence.

803. The borrower is not responsible for the breaking of a sword if he can prove he has used it in combat, nor for the breaking of a hoe if he has used it in the ordinary way.

804. The borrower shall make use of the loan only for the purposes it was intended for. If he uses it in such a manner as to cause deterioration, or even loss, the lender may either claim the value of the loan (as estimated before deterioration took place) or any profits the borrower may have made by excess of user : for example, where he has taken up another behind on a horse lent for a specific purpose. If the person on the pillion did not know that the horse was a borrowed one, he shall only be responsible in case the borrower is insolvent.

805. If the abuse made of the loan was not of such a nature as to have caused deterioration or loss, or if the object has not suffered at all, the borrower shall only refund the profits made by excess of user.

Section III

Of the Lender's Obligations

806. Where a loan has been made for some determined period or for the accomplishment of a certain piece of work, the lender may not claim it back until the said period has elapsed or the work has been accomplished.

807. In all other cases the duration of the loan for use is governed by custom ; but the lender may take back the object lent if he refunds to the borrower any expenses the latter has incurred.

808. If the borrower remains in possession of the land lent for purposes of cultivation or building after the expiration of the time fixed by agreement, he shall be considered a trespasser.

Section IV

Of Contentions Arising from Loans for Use

809. If a person declares on oath that he has hired out a certain object, whilst the person holding same affirms that it was delivered to him by way of a loan for use, the former's declaration shall be accepted, unless his social position be such as to give rise to a contrary presumption.

811. Where the risks are not at the charge of the borrower, his declaration that the object lent was returned to the owner shall be accepted until the contrary is proved.

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812. If an individual pretends to have been sent in order to borrow some object, such as jewellery, and the jewellery is subsequently lost, the person who sent the messenger shall be responsible, provided he admits having commissioned the latter. If he swears that it is not so, he shall be discharged; if the messenger supports his statement by an oath, he shall also be exonerated from responsibility.[1]

If the messenger admits that he was not sent, he shall pay the value of the object lost, provided he is a free man; if he is a slave, he remains debtor for the value, but can only indemnify the lender on obtaining his freedom; if the messenger maintains that he has delivered the object to the person who sent him, both he and the person supposed to have commissioned him shall be called upon to make oath.

813. All expenses concerning delivery and restitution must be borne by the borrower; views differ as to those incurred for the feed of a borrowed animal.[2]

[1] But according to the more generally accepted principle of Law, the responsibility remains with the messenger. (Perron, IV. p. 356.)

[2] Since the supply by the borrower of the animal's feed might be held to take the transaction out of the category of gratuitous loans for use. (Perron, IV. p. 358.)

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CHAPTER XXVII

USURPATION (*GHAṢB*)

WRONGFUL WITHHOLDING AND UNLAWFUL USER (*TA'ADDI*)

Ibn-'Arfa's definition : Usurpation consists in the wilful seizure and appropriation of another's property without the use of arms.[1]

Section I

Of Usurpation in General

815. USURPATION is a wrong [2] which is punishable with imprisonment or corporal chastisement,[3] if the wrong-doer has acted whilst in full possession of his faculties. Any person who falsely accuses another of usurpation is liable to the same punishment.

Section II

Of the Usurper's Responsibility

816. A usurper becomes responsible for the object he detains so soon as he has taken possession thereof; he is not entitled to avail himself of the defence of *force majeure.*

Jurisprudence varies as to the case where he is not in full possession of his faculties,

817. Thus the usurper is responsible :

(*a*) For the slave who is put to death for murder ; or

(*b*) for the horse which has died at his hands ; or

(*c*) for the sheep he has butchered ; or

(*d*) for any object of which he is found to be bailee and which he denies having received as such,[4] or

(*e*) for foodstuffs he has consumed even though he ignored whence they came.

[1] If seized by force of arms, the tort would then become the crime of brigandage (p. 343) ; if fraud had been used, then it is theft. If the thing is taken simply with the intention of making use of it, then the tort is *ta'adda* (cf., Zeys, II. p. 50).

[2] i.e., a delict, tort ; not a crime.

[3] *ta'zîr.*

[4] Here the denial establishes usurpation.

818. The usurper is responsible for anything destroyed by another at the bidding of the usurper; also for any injury caused by his having unlawfully dug a pit. The person who was the immediate cause of the fall, is, however, primarily responsible; unless the pit was dug with the object of making some person in particular come to grief, in which case both are equally responsible.

819. The usurper is responsible for the escape of the slave whose chains he has loosened, or for the evasion of an animal whose cage he has opened in the absence of the master.

He is also responsible for the loss of the goods of another, if he has opened the door of the place where they were kept.

820. All *res fungibiles*[1] which have unlawfully come into the possession of an individual shall be refunded in kind by the usurper, even though the market value may have risen.[2] A delay shall be accorded in order that he may find things of a similar kind or deliver them at the place they originally had been taken from, even though the identical thing is found in the possession of the usurper in another country. In this case the object shall be seized, unless he gives security, but the proprietor is not entitled to demand that the identical object shall be put back whence it was taken from.

821. Where a person, having unlawfully come into the possession of an object, is authorized by the owner to sell it, the sale cannot be revoked by the owner.

822. If the object has undergone a change in the usurper's hands, only the value of the object in its original state shall be returned, e.g. where gold has been worked into jewellery, clay into bricks, corn into flour, etc.

823. Again, if the object has perished, the value as estimated on the day the usurper took possession of it, shall be returned.

824. If the object has perished at the hands of a third person the owner may either sue that person for the value or may sue the usurper himself. The owner may also sue the latter for any deficiency in the reimbursement made by the former. The usurper in his turn may sue the third person for the value of the object on the day it perished.

825. A usurper shall be condemned to remove any construction he may have erected upon land he has seized; to return any profits he may have made by user of the usurped chattel, even game caught by a slave or falcon; to pay the letting value of the usurped land he has built

[1] i.e., things that can be replaced by equal quantities and qualities of the like kind.

[2] This would appear to be but just, but Zeys (II. p. 53) points out that Seignette's translation is wrong and that the word 'risen' should be 'fallen.' This appears to us illogical, for the usurper then makes a profit out of his crime; but nevertheless it is in accordance with the principle that *res fungibiles* must be exactly replaced without taking their value into account.

upon, or the hiring value of the usurped nets with which he has fished.

829. No damages can be claimed from a person who has sat down upon the clothes of another in a mosque or other assembly, or has given information to another person who has subsequently made use of the information in order to commit a theft. Again, no compensation is obtainable for having caused damage to some object if such damage has been entirely repaired. If the object is not returned in its identical state, the original value thereof may be claimed.

830. A usurper shall not be liable for the loss of the object by *force majeure*, if he merely intended to get a temporary enjoyment out of it ; neither is he liable for loss caused directly by the owner himself, as for instance where he offers the owner food that belongs to the latter. A usurper is not responsible for the depreciation of goods owing to the fluctuation of the market value. As in the case of larceny, the usurper only owes the object he has illegally obtained and is discharged from liability by bringing it back, even from a long voyage.

831. A usurper is responsible for partial loss, even though it is of minor importance. The owner has the option of demanding either the value of the object as estimated upon the day it was seized, or the object itself together with compensation for any deterioration.

832. Where the object has been improved by the wrong-doer, for example, by dying a piece of cloth, the owner may either take the original value of it or take it back and pay for the dying.

833. Similarly the owner of the land usurped may either demand that the wrong-doer shall remove any buildings he may have put up on it, or he may keep them, on paying the net value of the building materials, from which the expenses of removing the buildings (expenses which would have been incumbent upon the wrong-doer if he had been ordered to remove them) are to be deducted.

834. The person who illegally seizes and makes use of a woman (free or slave) or of a free man, must answer for any loss. Thus, he who sells a free person shall pay the blood-money, unless he can give him back his liberty.

838. In the absence of contrary proof, the usurper's sworn statement as to the loss of the object shall be accepted.

840. The owner of the object can ratify the sale effected by the usurper. He may either annul or ratify the enfranchisement of a slave effected by the person who bought him from the usurper.

841. A bona fide purchaser of property which has been usurped, is responsible for the loss of that property and for its products ; such loss having been deliberately caused by him and not by *force majeure*.

842. Any person having come into the possession of usurped property, either by way of gift or succession, is equally responsible if he knew of the illegality attaching to the property. If he was not

aware of it, the usurper himself, or his estate, is in the first instance made responsible, without prejudice to the owner's right of having recourse to the former for any deficiency.

844. A woman who accuses a man whose reputation is irreproachable of having violated her, and fails to present herself to the Court, holding him by the hem of his garment, is guilty of defamation.

Section III

Of Transgressions or Abuse of another's Property [1]

845. The term transgression is generally applied to the damage done by excess of user to the property of another, such damage being ordinarily of a partial nature.

846. Where deterioration of the object is such as to render it useless for the purposes it is intended for, the owner may either take back the object (in its deteriorated state) and claim damages for deterioration, or he may demand to be indemnified for the original value of the object. This, for instance, would be the case, where a borrower, or any other temporary possessor, should mutilate the tail or ears of a valuable horse, or should dry up the milk of a sheep or cut off the hand of a slave.

847. If deterioration is not such as to render the object useless for the purposes it is intended for, but does, nevertheless, diminish its value, the owner may only claim a compensation proportional to the damage done. This, for instance, would be the case, where a temporary possessor should dry up the milk of a cow, since a cow may be utilized for other purposes.

Section IV

Of Claims and Remedies

851. Where a usurper or transgressor has sown the field of another, the owner of the said field may recover same and he need not refund expenses incurred for labour and seeds, provided the crop has not reached profitable maturity. According to al-Lakhmî, the owner may, if the crop has reached profitable maturity, either take it over, subject to his paying its value, or he may demand that the crop shall be uprooted, if the season is not so far advanced as to prevent a new crop being sown. Should, however, the season be too far ad-

[1] The word 'transgression' is here used in a more restricted sense than usual. It is the exact translation of the Arab term. In fact the verb *ta'adda* signifies exactly *transgredi* to go beyond. The word is applicable to any act directed against another's property, in such a manner as to exceed the lawful limits. The analogy that exists between 'usurpation' and 'transgressions' has led Khalîl to place them in consecutive order. (Perron, IV. p. 662.) As 'transgression' is not an English legal term it has been rendered, in the heading to the chapter, 'wrongful withholding and unlawful user.'

vanced, the owner may only claim a year's rent, as would be the case if the possessor had acted bona fide.

852. The temporary possessor of a piece of land agrees to let the said land to a farmer for a year. A person who is legally entitled to the land claims recovery thereof. Now, if the claim is put in subsequently to the farmer having cultivated the said piece of land, the farmer's agreement holds good.[1] If the temporary possessor is evicted, the claimant may rescind the letting-agreement subject to his indemnifying the farmer for his labour. If the owner refuses to compensate the farmer, the letting agreement shall be maintained subject to the farmer paying the claimant one year's rent, unless he prefers to give up the tenancy without being indemnified.

853. If a letting-agreement is concluded for a term of several years, the claimant may either cancel the remaining term or he may ratify same, if the rent payable for the remaining term has been determined upon.[2] The tenant-farmer may not discontinue his tenancy on the grounds that the claimant refuses to guarantee him from possible eviction at a future date, that is, he has no option at all in the matter.

854. If the claimant ratifies the tenancy, the tenant-farmer shall be obliged to pay him in advance the rent due for the remaining term, provided: (*a*) it was agreed that the rent should be payable in advance as between the temporary possessor and the farmer, and (*b*) the claimant is solvent and offers sufficient security.

855. Both a bona fide possessor of land and a person holding land from a third person whose title to the land he is unaware of, are entitled to keep for themselves all agricultural produce of the land which they may have collected prior to their eviction being judicially decreed. The same rule applies to personal property.

856. A person who holds land or goods through inheritance or gift, is considered a possessor in good faith. The person who has come into possession of land or goods by purchase is also considered a bona fide possessor, provided he did not know that the transaction was tainted with any illegality.

858. The owner of land upon which a third person acting in good faith has put up buildings or made plantations, may take over the said improvements subject to his compensating that third person for his labour. If he refuses to give compensation, they shall both remain co-proprietors of the land and improvements, each one's interest in the

[1] The words 'the agreement holds good,' cannot be taken to mean that the tenant-farmer can insist upon his tenancy, since this would be in contradiction to the second part of the paragraph, but merely that he is entitled to an indemnity if the temporary possessor, i.e., the person who gave him the leave, is evicted by the claimant.

[2] It is indispensable that the rent to be paid should be fixed, otherwise the transaction would come under the category of sales with undetermined purchase price, which are illegal. (Perron, IV. p. 402.)

concern being in proportion to his contributed share as estimated on the day judgment is given. The person, however, who builds on land consecrated to *habs*, shall only be entitled to be compensated for the value of the materials expended.

859. A bona fide possessor of a female slave who has caused her to become a mother, shall be obliged to refund the rightful owner the value of the slave and her child as estimated upon the day judgment is given against him. If the child should have been killed by no fault of the bona fide possessor, he may either indemnify the rightful owner for the value of the child as estimated on the day of its death, or pay over the blood-money he may have received from the murderer. If the rightful owner claims that the woman was free, the bona fide possessor is not responsible for her dower, provided he was unaware that the woman was free.

860. If a tenant exceeds his rights by damaging a house and if the person who granted him the tenancy of the house is evicted by the rightful owner, the latter may claim the building materials and sue the tenant for the damage caused, even though the tenant may have been discharged from all liability by the person who granted him the tenancy.

861. Again, where a slave has been stolen from a bona fide purchaser, and is subsequently claimed by the rightful owner, the latter is entitled to prosecute the thief. The thief cannot avail himself of the defence that he has been pardoned by the bona fide purchaser.

862. When a runaway slave, pretending to be a free man, shall have rendered, even gratuitously, some service to a third person, the rightful owner shall be entitled to sue that third person for the value of the service rendered by the then fugitive slave.

863. The rightful proprietor of a piece of land may, if a mosque has been built on his land, demand that the said mosque be demolished.[1]

[1] He is however obliged to use the materials for the building of another mosque. (Perron, IV. p. 411.)

CHAPTER XXVIII

PRE-EMPTION (*SHUFʿAH*)[1]

Ibn-ʿArfa's definition: Pre-emption is the right by which a co-owner in immovable property may redeem from a stranger, in consideration of compensating him, that part of the property which has been sold to him by another of the co-owners.

Section I

Of the Exercise of the Right.

Sub-section 1. Of those who have the right.
Sub-section 2. Of the third party,—the stranger.
Sub-section 3. Of the object of pre-emption.
Sub-section 4. Of the obligations of the pre-emptor.

Section II

Of Pre-emption and Property by Accession

Sub-section 1. Of buildings and plantations.
Sub-section 2. Of the produce of the land.
Sub-section 3. Pre-emption and irrigation rights.

Section III

Of Things not susceptible to Pre-emption

Section IV

Of the Extinction of the Right

Section V

Of Pre-emption as a Collective Right

Section VI

Of the Effects of Pre-emption

Section VII

Of Precedence amongst those who may exercise the Right

[1] The chapter refers to conditions not prevailing in West Africa.

SECTION VIII

OF PRE-EMPTION IN THE CASE OF SEVERAL SUCCESSIVE ALIENATIONS [1]

SECTION IX

OF PRESUMPTIONS

[1] In all cases in which one or more of the co-owners has the right to exercise pre-emption the alienation must have been by sale without option. The right only comes into operation when the vendor has actually sold the property; cf., Abdur Rahim, p. 273.

CHAPTER XXIX

APPORTIONMENT IN CO-PROPRIETORSHIP[1] (*ḲISMAH*)

Ibn-ʿArfa's definition. Apportionment is the means by which two or more co-proprietors determine the ownership or the rights of user in their respective shares. Appropriation may be either legal or conventional.

Section I

Of the Different Systems of Apportionment

Section II

Of the Property to be Apportioned

Section III

Of the Apportionment of the Shares

Section IV

Of Rescission on the Ground of Error

Section V

Of the Right of the Co-owners to sell by Auction

Section VI

Of Rescission on account of a Redhibitory Defect in the Sale

Section VII

Of the Guardian's Authorization

[1] The possession of things in common, *indivisum*, has all the value of juristic and economic dogma with Muslims. Thus, pre-emption is highly favoured by the Law, but not so apportionment, which seems to have been permitted only with regret and further to have been complicated in its application with jealous care. All the resources of Canon Law seem to have been called in to put obstacles in the way of the revolutionary who would set up his own home, with new wants and desires, thus enfeebling his associates of yesterday. (Zeys, II, p. 87.) The subject is of no practical interest to administrators in West Africa.

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CHAPTER XXX

DORMANT PARTNERSHIPS (*ḲIRÂḌ*) [1]

Ibn-ʿArfa's definition. A *ḳirâḍ* agreement is a contract by which a person entrusts funds to a trader [2] in order that he shall traffic therewith, subject to the lender having a share in the profits.

SECTION I

A *ḲIRÂḌ* contract [3] is one in which a commission to trade with a certain fixed capital, duly handed over, is conferred by the dormant partner on his agent, on condition that the former shall participate in the profits in a certain defined proportion.[4]

[1] Khalîl places the chapter on *ḳirâḍ* immediately following that on apportionment, because that form of partnership is chiefly based on the apportionment of the shares in the profit.

The word *ḳirâḍ* is the name given to the capital handed to an agent to trade with. The root of the word signifies, in its original sense, 'to cut off,' 'to separate.' *Ḳirâḍ* may be roughly rendered by the French term *commandite* or the Latin *in commendam*, (and still more roughly by the English 'dormant partnership'). In this contract the capitalist, or lender (here referred to as the dormant partner) 'cuts off' or 'separates' a part of his assets in order to entrust that part to his agent, *ʿâmil*. The Prophet preserved this form of commerce from pre-Islamic times, thus allowing everyone to make use of his wealth. (Cf., Perron, IV. p. 664.)

[2] i.e., the factor, which term is the literal translation of the Arabic *ʿâmil*. The word agent has, however, been used throughout this chapter.

[3] The contract only actually comes into force when the agent has started on his trading journey.

[4] *Ḳirâḍ* is the most common form of commercial venture among Muhammadans. Zeys (II. p. 97) thus summarizes its historical and economic origin: 'To try and make profit is the duty of every Muslim,' has said the Prophet. There are four ways in which this may be done: by means of the *jihâd*, which is the most noble; by means of a trade; by agriculture, by commerce.

Now in commerce there is something degrading for an honest and well-brought up man, for it consists in buying at a low price and selling at the highest; one has to bargain and to bluff the buyers, to puff one's goods, to be obstinate and tenacious in dispute. On the other hand men cannot augment and engage their capital in fruitful operations by themselves; they cannot leave their homes and cross mountains, rivers, and deserts, in order to find their profit in distant countries. Thus from early times in Arabia, it became the custom to organize real commercial enterprises under the charge of a caravan leader commissioned by one or more rich notables.

The essential difference between *ḳirâḍ* and an ordinary partnership is that the latter has its being there where the partners reside; the interests involved are small; each of the partners plays an active part in the concern, and each

Section II

Of the Constitution of the Capital.

970. The capital in a *ḳirâḍ* agreement may not consist of a debt owed by a debtor to his creditor, nor may it consist of a pledge or of a security.[1]

971. The capital may not consist of gold dust, unless it is the local custom to use gold dust as tender in commerce; nor may it consist of debased coin, nor of goods which the agent has taken upon himself to realize.[2]

972. If the agent has been charged to collect a debt or to effect an exchange, and to apply the moneys thus realized as the capital of a *ḳirâḍ* agreement, the agent then has a personal right of action against the dormant partner[3] to enforce payment of a remuneration for the execution of those transactions, without prejudice to his lawful share in the profits of the *ḳirâḍ* trading as fixed by local custom.

Section III

Of Prohibited Acts

Sub-section I. Of conditions that are presumed.

973. In the following cases the agent is entitled to his share in the profits as fixed by local custom:

(*a*) Where a clause in the contract relating to his share is ambiguous or vague and cannot be interpreted according to local custom.

(*b*) Where the partnership was fixed for a shorter or longer term than was, in fact, necessary for the carrying out of the transaction.

(*c*) Where all the risks of the enterprise have been thrown upon the agent.[4]

(*d*) Where it has been stipulated that the agent shall buy goods from such and such a person and shall subsequently apply the moneys realized by re-sale to make up the *ḳirâḍ* capital.

(*e*) Where it has been stipulated that the agent shall buy goods that can only be obtained occasionally in the market.

(*f*) Where, after the transactions (for which the *ḳirâḍ* agreement was

contributes his share of the capital; whilst in a *ḳirâḍ* contract, there is the capitalist who furnishes the funds and the executive agent who alone operates, not only on a large scale, but almost without control and far from the place where the contract was entered into.

Again in a *ḳirâḍ* contract, the capital must, at any rate as a general rule, consist in cash, whilst in an ordinary partnership it is not so; (see rule 602, p. 193).

[1] i.e., the debtor or the holder of the pledge being the agent, and the creditor the dormant partner.

[2] For in these cases the value of the capital could not be strictly determined.

[3] For these transactions cannot be included under a *ḳirâḍ* agreement, and if allowed would pervert the meaning of *ḳirâḍ*.

[4] The dormant partner remains the owner of the capital; the agent is only in possession by virtue of the trust reposed in him; he is only held responsible for negligence or the breaking of the rules of the contract. (Zeys, II. p. 108.)

called into existence) have determined, disagreements arise with regard to each partner's share of the profits, and where either party's allegations appears to be equally improbable.

Sub-section 2. Of illegal conditions.

974. Illegal conditions, other than those above described, annul the contract and give the agent a personal right of action against the dormant partner to recover the befitting remuneration for his labours.

975. The following are illegal conditions: Where the dormant partner reserves the right of interfering with the management of the *ḳirâḍ*, of being consulted in the transactions, or of appointing an observer to control the agent.

976. The dormant partner may, however, give the agent a slave as a paid assistant, but not as overseer; provided the dormant partner does not stipulate that he shall receive the slave's remuneration.

977. Again, the agent cannot be required to do manual labour such as sewing or embroidery; nor can he be obliged to admit another partner, nor to amalgamate his own private funds with those of the *ḳirâḍ*. Further, the agent cannot be compelled to engage a hawker nor to cultivate land himself; nor may he be obliged to abstain from making any purchases on behalf of the *ḳirâḍ* prior to his arrival in any one given district.

978. Where an individual agrees to advance funds to another, in order that the borrower may apply the money for the payment of purchases already made by him, such agreement is merely a loan for consumption, even though the agreement be made under the form of a *ḳirâḍ*; as where, for example, the borrower and lender are to share equally in the profits.

979. The agent in a *ḳirâḍ* agreement is to have full discretion in selling to and buying from whomsoever he pleases. His discretion is also to be unfettered as to time and place for transacting business; thus, he cannot be obliged to make purchases in any one given district.

980. Light manual labour such as the folding and unfolding of cloths are at the agent's charge. If he engages assistants for the execution of work of this kind, he is personally liable for their remuneration.

981. The respective shares in the profits of each associate in a *ḳirâḍ* agreement are fixed in the contract, but these may be subsequently modified by common consent.

982. It may be lawfully stipulated that the *zakât* on the profits is to be borne by either party.

983. It may be stipulated that all the profits shall be attributed either to the dormant partner or to the agent, or even to a third person. Unless there be a contrary agreement, the risks are at the agent's charge if he alone is to take all the profits. A partnership as above described is improperly styled *ḳirâḍ*.

984. If the *ḳirâḍ* funds are considerable, the agent may stipulate that a slave or animal for transport purposes shall be gratuitously provided for him.

985. The agent may, if he chooses, amalgamate the funds of several dormant partners including his own. It is even his duty to do so, if it is to be feared that individual competition might effect the market value and thus interfere with the interests of the partnerships.

986. If the agent increases the original fund by means of purchases on credit, made in his own name, he becomes a shareholder to that amount as estimated on the day of purchase.

987. The agent may take away with him upon his journey the funds confided to him, provided the *ḳirâḍ* agreement has not been revoked before business transactions have commenced.[1]

988. The agent may without vitiating the contract, ask for an increase of funds in order to make an advantageous purchase; he may not do so for a purchase already executed.

989. The agent may effect exchanges and if necessary avail himself of the *actio redhibitoria*. The dormant partner may, however, accept for himself the defective object, provided it represents the whole value of the funds engaged in the enterprise, and provided it was paid for in money.

990. An individual may constitute his slave or paid servant as his agent in a *ḳirâḍ* agreement.

991. A dormant partner may entrust the same agent with two funds of a different nature or paid over successively. He may do so and even stipulate that different conditions as to the sharing of the profits are to attach to each fund, provided: (*a*) the paying over of the second fund is made before the first one is applied, in order that both funds may be amalgamated into one; or (*b*) the paying over of the second fund is made after application of the first, so as to form a distinct fund.

992. The dormant partner is entitled to make purchases from the *ḳirâḍ* partnership just as any other person might, provided no illegal intention attaches to the transaction.

Sub-section 3. Of the responsibility of the agent in certain cases.

993. It may be stipulated in a *ḳirâḍ* agreement that the agent shall be liable for all risks if he does any of the following things: crosses rivers; travels at night or by sea; buys goods of a certain nature.

994. The agent shall be held responsible for loss in the following cases:

(*a*) If he uses the funds for cultivation on a large or small

[1] Cf., p. 227, note 3; p. 232, rule 1016.

scale in a country which offers no security for such an undertaking.

(*b*) If he transacts business with the funds (in specie) after the death of the dormant partner.

(*c*) If he places the *ḳirâḍ* funds into another partnership or takes another partner into the business without the dormant partner's consent.

(*d*) If he sells on credit or entrusts another to act in his place without the dormant partner's consent.

995. If the agent gives a third person, commissioned by him to act in his place, a larger share in the profits than he himself is entitled to, he shall be personally liable for that excess. Again, in such a case, the agent shall be held responsible for any loss, even though such loss may have occurred prior to any business transaction involving the *ḳirâḍ* funds.

996. Any profits made by the person commissioned by the agent go to the account of the dormant partner and of the sub-agent only.

997. The dormant partner is solely entitled to any profits the agent may have made by acting outside the terms of the contract.

998. Again, the agent has no claim on the profits if the *ḳirâḍ* agreement has been revoked before any application of the funds.

999. Both dormant partner and agent are responsible in the same degree as any outsider for any damage either may cause to the partnership.

1000. The agent may not buy from the partner nor may he buy on credit on behalf of the *ḳirâḍ* partnership, even though he may have permission to do so. He may not incur liabilities beyond the amount of the capital.

1001. The agent may not accept a post as agent in another enterprise, which post would absorb his time to the prejudice of the first *ḳirâḍ* partnership.

1002. The dormant partner cannot sell without the agent's authorization.

1003. The profits are to be balanced by the losses, and even by such losses as may have occurred prior to the application of the funds.

1004. The dormant partner may replace any partial loss that may have occurred and renew the contract. The agent is bound to comply with this unless the original capital has been entirely lost.

1005. In default of such partial loss being replaced, any unpaid purchase made by the agent is put down to his account.

1006. If there are several agents in a *ḳirâḍ* agreement, each agent's share in the profits shall be fixed in proportion to his zeal on behalf of the partnership.

1007. The agent is entitled to grant himself from the partnership funds a reasonable allowance for travelling expenses, provided the

said funds are considerable enough, and provided the journey is not undertaken for some private purpose, such as visiting his wife, making a pilgrimage, or going on a war expedition.

1008. If the agent is accustomed to keeping a servant, he may pay the latter's wages out of the partnership funds. He may also use partnership funds for the purchase of clothes, if his absence be prolonged. He is, however, not entitled to indemnify himself in this way for medicaments.

1009. If he undertakes a journey both for his private interests and for those of the partnership, the expenses shall be divided.

Section IV

Dissolution of a *Ḳirâḍ* Partnership

1015. Prior to the application of the capital, a *ḳirâḍ* agreement may be rescinded at the will of either party.

1016. Thus the contract may be rescinded by the partner notwithstanding any preparations made by the agent, provided the agent has not started on his travels on behalf of the partnership.

1017. Either party may rescind the contract whenever the funds have been liquidated.

1018. Where one party demands liquidation and the other objects to such a course being taken, the question shall be submitted to the judicial authorities.

1019. If the agent should die in the course of his employment, his heir shall take his place, if there is sufficient guaranty as to his honesty. If not, the heir must find another agent as reliable as the deceased agent, or he must hand over the funds to the dormant partner, relinquishing all claim to a share in the profits.

Section V

Of Disputes

1020. The agent's statement shall be accepted until the contrary is proved, with regard to :

(*a*) The loss of capital and amount of such loss.

(*b*) The restitution of the capital to the partner, where returned by the agent in the absence of any witnesses.

(*c*) The existence of a *ḳirâḍ* agreement, if the person who had advanced the capital maintains that the agent was merely a hired hawker, or vice versa.

(*d*) The agent's *bona fides*.

(*e*) All expenses incurred by the agent or a third person on behalf of the partnership.

(*f*) The agent's allotted share in the profits, provided his, the agent's, allegations appear to be probable, whether the funds are in

his possession or in the hands of a third person or deposited with the dormant partner.

1021. The dormant partner's statements shall be accepted until proof of the contrary, as regards :

(*a*) The share in the profits he has reserved for himself, if his allegations appear to be the only probable ones.

(*b*) The nature of the contract, where the partner maintains that it was a *mutuum* agreement or a loan for consumption, whilst the agent maintains that he has received the funds for the purpose of a *ḳirâḍ* partnership or by way of deposit.

1022. The partner's word shall be unreservedly accepted with regard to his share in the profits, so long as the capital has not been applied.

1023. Where the partner affirms that he delivered the funds by way of deposit, the would be agent shall be responsible for loss if he has made use of the funds.

1024. The burden of proof lies on the party alleging the nullity of the contract.

1025. On the death of an agent in a *ḳirâḍ* partnership, or of a hawker or bailee in charge of a deposit, their estates shall be made liable for the funds entrusted to them, where such funds cannot be found in kind among their assets. The dormant partner's or the bailor's claims shall rank with those of the other creditors.

1026. If precise indications can be found, made either before or during the deceased man's last illness, identifying the funds which formed *ḳirâḍ* assets or constituted a deposit, the dormant partner's or bailor's claims shall be satisfied before those of all other creditors.

1027. The agent of a *ḳirâḍ* partnership may not make presents out of the partnership funds, nor may he transfer any goods forming part of the partnership assets at their naked value. A certain latitude is left him with regard to repasts he may give ; but he is bound to keep within reasonable limits. If he abuses the freedom given him in this respect, he shall render an account to the dormant partner and may be held liable to make refund of all unreasonable expenses.

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CHAPTER XXXI

LETTING OF GARDENS (*MUSÂḲÂT*)[1]

Ibn-'Arfa's definition: The contract for the letting out of gardens [2] is one in which one party agrees to undertake the cultivation of plants, etc., subject to his receiving a share in the fruits thereof; such an agreement being made under another form than a contract of sale, or for the hire of labour, or a conditional contract.[3]

SECTION I

OF THE SUBJECT MATTER OF THE CONTRACT

Sub-section 1. Of the cultivation of fruit-bearing trees.

Sub-section 2. Of the tenant's obligations.

Sub-section 3. Of plants which may form the object of a *musâḳât* agreement, under certain circumstances.

1034. A *MUSÂḲÂT* agreement may be entered into for the cultivation of annuals such as cereals, the sugar-cane, onions, melons etc., provided: (*a*) the proprietor is unable to attend to the cultivation himself; (*b*) that there is danger that the crop might perish; and (*c*) that the crop is above ground but has not attained to maturity.

1035. The duration of the contract may be fixed after the harvest.

[1] *Musâḳât* is a term employed to designate gardens, and is defined as follows: a contract stipulating the labour and attention necessary for the cultivation of certain plants, subject to a share in the fruits and products.

The word *musâḳât* is derived from the root *sâḳ'â* 'to water,' because the watering of the soil of herbaceous plants and trees is the essential and indispensable factor.

In those districts where irrigation is unnecessary owing to the fact that the soil contains sufficient moisture for trees and plants to live on, or where the ordinary rains suffice, the work of watering is replaced by all other labour appertaining to the care of trees and plants.

The word *musâḳât* has been adopted to designate all labour that is indispensable and useful to good cultivation. (Perron, IV. p. 666.) The cultivation referred to has reference to what we should call *market gardening*.

[2] The word 'gardens' is here used to denote small plots of land irrigated or otherwise, suitable for the cultivation of vegetables, fruit, tobacco, etc.

[3] Cf., with the form of contract known as *khamsat* (note 1, p. 199) which refers only to the cultivation of cereals.

1036. The contract is presumed to be made for the first crop if the second crop has not been stipulated for.

1037. A *musâḳât* agreement may comprise untilled plots of land, [1] whether such plots be enclosed by plantations and cultivations or not. The agreement is, however, null and void, unless the following conditions are fulfilled: (*a*) that the plots are let subject to the same conditions as the surrounding land; (*b*) that the tenant provides the seeds; (*c*) that the letting value of the land itself does not exceed one third of the total value of the net profits (i.e. of the value of the land and its products).

1038. Further, the contract is illegal, if the proprietor stipulates that the untilled plots shall be cultivated by him for his benefit only.

1039. If the letting agreement makes no mention as to the said plots of land, the tenant shall have the enjoyment thereof as though he had made a stipulation to that effect.

1042. It can be lawfully stipulated that *zakât* shall be at the charge of either party.

1043. A *musâḳât* agreement may be made for a term of several years. It cannot be concluded for an undetermined or very long period.

1044. In case the gardens are important the tenant may stipulate that the proprietor shall furnish him with beasts of burden and slaves.

1046. It may be stipulated that the tenant shall keep walls in repair, clean canals and wells, keep up hedges or water supplies, and that he shall bear all other minor expenses of upkeep.

SECTION II

OF THE RESCISSION OF A *MUSÂḲÂT* AGREEMENT

1047. A *musâḳât* agreement may be rescinded by mutual consent, provided there are no damages stipulated for.

1048. A tenant is entitled to transfer his letting agreement to another person, even though such person should offer less security than himself.[2] He is, however, bound to certify as to the bona fides of his sub-tenant, and may be held responsible if the sub-tenant fails to comply with the terms of the agreement.

1049. If the tenant fails to execute the contract or to find a reliable sub-tenant, he shall have to quit without an indemnity.

1050. A *musâḳât* contract cannot be rescinded owing to the tenant's subsequent bankruptcy.

1051. Gardens may be let out by a testamentary guardian or by

[1] Arabic: *bayâḍ al-arḍ*, i.e., 'white soil,' because it is bright in the light of sun, moon, and stars, owing to the fact that there are no trees or plants on it. (Perron, IV. p. 541.)

[2] Cf., with an agent in a *ḳirâḍ*-agreement, who is not entitled to do so; the reason being that in the latter case the funds are withdrawn from the lender, which is not the case in *musâḳât* agreements.

a debtor who is under no legal disability, or by a Believer to a tributary subject, provided there is no fear of his making wine or other intoxicating liquors.

1052. A *musâḳât* agreement may not be converted into a partnership as between the lessor and the tenant.

1053. No *musâḳât* agreement may be entered upon subject to the tenant furnishing trees to be planted upon the land.[1] Nor shall such agreement be lawful if the trees on the land are still so undeveloped as not to bear fruit in the current year of the tenancy.

1054. A *musâḳât* agreement tainted with illegality shall be annulled unless cultivation has already begun.

1055. A *musâḳât* agreement for a term of one or several years shall be annulled, if it is discovered, in the course of its execution, to be tainted with illegality by reason of some unlawful stipulation involving for instance some extraordinary advantage for either party, whether such advantage be in kind or money. The tenant shall in this case be only entitled to a customary remuneration and has no claim to a share in the products of the garden.

1056. On the other hand, the agreement shall be maintained and the tenant's share in the products shall be increased or diminished according to local custom in the following cases: (*a*) where some of the trees are not bearing fruit; (*b*) where the agreement has been combined with a sale; (*c*) where the tenant has stipulated that the lessor shall share in providing labour, or that he shall provide slaves or beasts of burden; (*d*) where the lessor has stipulated that the tenant shall be responsible for the transport of the former's share in the fruits, or where the lessor makes a stipulation to the effect that the tenant is to cultivate another garden gratuitously; or (*e*) where the stipulations of the agreement vary for the different years constituting the tenancy, or for the different gardens that form part of one and the same contract.

1057. If after execution of the contract, disputes should arise as to the share of the tenant, then, in the absence of proof or probability as to the allegations brought forward by either party, the shares shall be awarded in accordance with local custom.

1058. A *musâḳât* agreement, like any other form of letting contract, cannot be rescinded if the lessor subsequently discovers that he has been dealing with a thief. It is the lessor's business to take the necessary precautions. Here the same rules apply as where a vendor concludes a contract of sale with a bankrupt, not knowing of the bankruptcy.

1059. All fruit falling from the trees is divided in the same way as all other fruit.

[1] A contract which stipulates the planting of trees in consideration of a salary, or of a part of the land with the trees thereon, is called a *mughârasah* agreement. Though omitted by Khalîl, it is fully treated of in the *Tuḥfat*, Rules 1115—1120, and by Zeys, II. pp. 125-129.

Section III

Of Disputes

1060. The burden of proof lies on him who alleges that a ***musâḳât*** agreement is null and void.

1061. If the tenant fails to execute all the labour at his charge, the lessor may retain a proportional part of the tenant's allotted share in the products.

CHAPTER XXXII

HIRE (*IJÂRAH*) [1]

Ibn-'Arfa's definition : An *ijârah* contract is one in which one party sells to the other the temporary enjoyment of movable property other than ships and animals of the lowest grade, in return for a price which is not raised on the products of such movable property. The said price is to be in proportion to the temporary enjoyment sold.

An *ajar* contract is one whose object is the temporary enjoyment of movables or immovables other than ships.

According to al-Dardir, *ijârah* and *ajar* are synonymous.

FOUR elements are necessary to constitute a valid hiring contract :

(*a*) The contracting parties, i.e. the lessor and the lessee.

(*b*) A thing, the enjoyment of which is the object of the contract.

(*c*) The remuneration or price.

(*d*) Consent validly given, which renders the contract obligatory.

Miyârah, the chartering of a vessel, is excluded from the definition of an *ijârah* contract, because transport by sea can only form the object of a conditional contract.

SECTION I

OF HIRING CONTRACTS

Sub-section 1. Of the conditions that are necessary for the validity of the contract.

1062. There are two necessary conditions for a valid *ijârah* contract : (*a*) legal capacity of the contracting parties, (*b*) a stipulation of a price or fixed remuneration which one party undertakes to pay to the other. These conditions also apply to contracts of sale.

1063. The hiring price must be paid in advance in the following

[1] To quote Abdur Rahim (p. 316) : 'contracts with reference to usufruct, whether it be the produce or use of property movable or immovable, or the labour and services of men, are classed under the general designation of *ijârah*, which means letting and hiring. *Ijârah* is defined as the sale of ascertained usufruct in exchange for some ascertained thing.'

cases: (*a*) if it consists of a definite object; (*b*) if there has been a stipulation to that effect; (*c*) if it is the local custom to do so; (*d*) if it is for the hire of any given animal for some definite journey not yet commenced.

1064. An exception is made in the case of the hire of beasts of burden hired for a pilgrimage, in which case only a small part of the hiring price need be paid in advance.

1065. In all other cases, the hire need only be paid day by day.

1066. Any contract of hire in which the hiring price consists of a definite object is invalid in those districts where it is not customary to pay in advance.[1] Are also void: all contracts of hire combined with a conditional agreement; contracts of hire may, however, be combined with a sale.

1067. Thus the following conditional agreements are void as contracts of hire: where a person agrees to grind corn subject to his receiving the bran; or where he agrees to weave cloth in return for a proportional share of the cloth; or where he agrees to press olives subject to a share of the oil, etc.

1068. Are null and void: all letting agreements of land, in which the rent consists of foodstuffs, or of a share in the agricultural products, unless the sole product of the said land is wood.

1069. It is illegal to agree that one person shall carry foodstuffs to a given district subject to his keeping some portion thereof by way of remuneration, unless the share is delivered to him in advance.

1070. It is illegal to stipulate that the remuneration for a given piece of work shall vary according to whether it is delivered sooner or later.

1071. It is illegal to hire out one's services, to act as driver to a beast of burden belonging to another, when the hiring price is to consist of a share in the profits.

1072. If, however, the agreement should have been carried out, the total profits shall belong to the driver subject to his paying a fair hire for the animal. Conversely, the profits would belong to the owner of the animal, subject to his paying a fair remuneration to the driver, if it had been agreed that the latter should hire out the animal for transport purposes.

1074. The remuneration or salary may be fixed in proportion to the work that is to be done. It may, for instance, be agreed that the driver of a beast of burden shall keep as remuneration a definite fraction of the load of wood carried.[2] Again, it may be agreed that the person who undertakes the grinding of corn shall keep as remunera-

[1] Since such an agreement would involve a debt against a debt. (Perron, IV. p. 562.)

[2] The beast of burden and the load must be clearly and absolutely determined. (Perron, IV. p. 568.)

tion a definite measure of corn or oil, provided the quality is throughout homogeneous.

1075. A lessor may hire from his lessee the things he has let.

1076. A master who takes in an apprentice may stipulate that the apprentice shall engage himself for one year.

1077. It is lawful to hire an individual for the gathering of a particular crop, subject to that individual's remuneration being, say, one half of the crop.

1078. An animal may be hired for transport purposes to a given place, and the hirer may reserve the right of rescinding the contract at will, subject to abatement of hiring price.

1080. In a lease of several years it is not necessary to determine beforehand the amount of rent payable for each period of the lease.

1081. A plot of land may be let with the object of building a mosque thereon. On the expiration of the lease, the lessee is bound to pull down the mosque at his own expense.

1082. An individual may hire out his services as dustman or for executing the punishment of retaliation, or bodily chastisement, on behalf of another.

1086. It is lawful to hire the services of a wet-nurse, and the laundry expenses shall be borne either by the infant's father or by the nurse in accordance with local custom.

1087. Such a contract of hire may be rescinded : (*a*) by the husband of the wet-nurse, if he has not consented to her undertaking the nursing ; (*b*) by the infant's guardian, if the nurse is pregnant ; (*c*) by the surviving nurse, if two nurses have been hired and one dies, or if the father of the infant dies without having paid the nurse, unless the heirs undertake to do so ; (*d*) by any wet-nurse, if the child has an extraordinary appetite. Cancellation of the contract may also be made in the case where a man engages a workman, subject to his providing the latter's food, and the workman proves to have an excessive appetite.

1088. If the husband of a nurse has given his consent to her engagement as a wet-nurse, he may not cohabit with her during the period of nursing, nor may he oblige her to travel, even though no harm should result to the infant.

1089. A wet-nurse may not nurse two infants at the same time.

1091. It is permissible for a vendor to stipulate that the buyer shall trade with goods sold to him during a fixed period for the benefit of the vendor,[1] provided it has been agreed that all losses shall be made good by the vendor.

1092. It is permissible to hire an individual as herdsman for a specified herd. The remuneration fixed shall be wholly due, notwithstanding any diminution of the herd.

[1] As where, for example, the vendor allows the buyer a certain abatement in the purchase price. (Perron, IV. p. 578.)

1093. If a beast of burden has been hired the whole hiring price shall be paid, notwithstanding the fact that the animal has not been used by the hirer.

1094. It is permissible to let out the banks of a river for the purpose of establishing a mill.

1097. A monthly salary may be agreed upon to be paid for the teaching of the Korân. The teacher shall be entitled to a customary fee if no remuneration has been stipulated.

1098. It is lawful to let out vases or other household and cooking utensils.

1099. It is lawful to engage an individual for the purpose of digging a well, subject to his being paid either by the day or by the job.

1100. The Law is not in favour of agreements such as the following :

(*a*) Hire of jewellry.

(*b*) Sub-hire of an animal or garment.

(*c*) Engaging a person at a salary to teach Law and the rules of succession. Also the hiring out of law-books.

(*d*) Engaging a person at a salary to teach the art of chanting the Korân.

(*e*) Engaging musicians to teach the playing of drums and flutes at a wedding feast.

(*f*) Hiring out Muhammadan slaves to an Unbeliever.

(*g*) Letting out a mosque for religious services.

(*h*) Letting out the upper part of a mosque as a private dwelling.

Sub-section 2. Of the object of a hiring agreement.

1101. It is essential that the object of every *ijârah* contract should be some advantage of estimable value which one party undertakes to provide for the other, such advantage being lawful and real. Thus it cannot consist of a thing ordinarily consumed by use, nor can the said advantage consist of an action which one is bound to perform personally.

1104. It is not lawful to let or to sell a house which is to be used as a Christian church. If this should have been done, the rent or the difference between the actual value of the house and the sale price shall be confiscated and distributed in alms.

1105. It is not permissible to hire another person to do an act which one is bound to perform personally, as, for example, for the saying of morning prayers ; it is, however, permissible to engage a person to pray for the dead.

1107. A herdsman may not undertake to look after two flocks if the second flock is too numerous to be looked after with the first. The herdsman may only do so if he has someone to help him, and if the agreement contains no stipulation to the contrary.

1108. A herdsman is not bound to look after the new-born of the flock unless there is a local custom to that effect.

1109. In the absence of any custom to the contrary, the following items are at the charge of the employer: thread for the sewing of a garment; the fixing of a mill-stone; the mason's tools. When a beast of burden is hired, the hirer must provide the harness and pack saddle.

1110. Local custom shall be complied with as regards the mode of travelling, stoppages, transport of victuals and luggage of the traveller. Again, local custom decides at which hours of the day silk garments which have been hired are to be taken off.

Sub-section 3. Of risks.

1111. Hired servants, workmen or persons hiring movables are simple bailees. As such, the risks are not at their charge.[1]

1112. Thus, a carrier hired for the purpose of carrying oil, foodstuffs or fragile objects is not responsible for any damage or loss caused by no direct fault of his, as where, for example, loss or damage is caused by the fall of the beast of burden or by the breaking of a rope.

1113. The following are not responsible for loss or damage: caretakers of houses; workmen working for their employer; brokers known to be honest men; sailors whose vessel has been lost owing to the act of God.

1114. A herdsman is responsible for the loss of cattle in his charge if he has not complied with his employer's instructions. A carrier is also responsible for any loss caused by his own fault.

1115. A workman is responsible for the thing entrusted to him for the purpose of his working it up, if the thing be one which can be hidden from view. This rule applies although he may have no workshop and even though no remuneration has been stipulated, provided he publicly exercises his trade. An artisan is, however, not responsible for accessories, such as a pattern given to him to work by.

1116. If the thing entrusted to the workman is lost and if he is unable to prove *force majeure*, he is responsible for the value of the thing as estimated on the day it was delivered to him; this rule applies notwithstanding any stipulations to the contrary, even though the workman may have formally requested the owner to take back the object. In no case is he entitled to claim remuneration.

1117. Once the work stipulated for has been executed and verified by the owner, the responsibility of the workman ceases if the owner omits to take the object back into his possession.

1118. Shall be accepted until the contrary is proved:

(*a*) The statement of the herdsman who alleges that he has butchered an animal for fear of it dying, or who maintains that the animal killed was stolen from him.

[1] i.e., where there has been no negligence; cf., rules 768–781, pp. 209–211.

(*b*) The statement of the doctor (or barber) who maintains that he did pull out the tooth designated to him.

(*c*) The statement of the dyer who alleges that he has dyed the cloth in the colour that was ordered.

Sub-section 4. Of rescission.

1119. An *ijârah* agreement ceases on the death of the workman engaged, but not on the death of the employer. Again, an *ijârah* agreement ceases on the loss of the thing hired but not on the death of the person who has hired it.

1121. An *ijârah* agreement can be rescinded:

(*a*) If the hirer (or lessee) is evicted or disturbed in the quiet enjoyment of the property let.

(*b*) If a workshop is closed by order of the government authorities.

(*c*) If a hired wet-nurse becomes pregnant or if she falls ill so as to be unable to continue the nursing of the child.

(*d*) If a hired slave is found guilty of theft.

(*e*) If a hired slave falls ill or runs away, unless he returns before the expiration of the contract. In the latter case the contract shall be valid for the unexpired term. This last mentioned rule does not apply to the hire of a beast of burden that falls ill and recovers in the course of the journey.

1125. If a lessor or a person who hires out an object admits that a third person has a better title than he to the object let, such an admission shall not have the effect of annulling the lessee's or hirer's agreement.

Again, if a hired carrier is delayed, this is not a sufficient cause for rescinding the contract, even though such delay may be to the prejudice of the hirer, unless the transport was agreed upon to be effected by a fixed date or for the purpose of a pilgrimage.

1127. An *ijârah* agreement is not cancelled by the manumission of a slave, who does not change his status by reason of such manumission until the expiration of his engagement. The hiring price belongs to the master, if it was agreed that the slave should only be free after the expiration of the agreement, otherwise it belongs to the slave.

Section II

Of the Hire of Beasts of Burden

1128. The hire of a beast of burden for transport purposes is subject to the same rules as all other *ijârah* agreements.

1129. It is lawful to hire an animal, agreeing that the person hiring shall provide the animal's feed, or again that he shall maintain the owner of the animal, or that the owner shall maintain the person who has hired the animal.

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1130. An animal may be hired by the month or for the purpose of a particular job, as, for instance, for the transport of a load of flour.

1131. It may be agreed that the hired animals are to be used for the transport of a determined quantity of goods, without fixing the load each animal is to carry.

1132. It is lawful to stipulate for the transport of a person who is not present, but the agreement ceases to be obligatory if the person proves to be of excessive weight. If the person to be carried is a woman and she bears a child during the journey, the carrier is bound to provide for the transport of both mother and child.

1133. The person who hires out an animal is entitled to reserve for himself the use of the animal for one month, provided the hiring price has not been paid in advance.

1134. In a case of emergency or if the hiring price has not been paid in advance, the person who has hired an animal may lawfully accept another animal instead of the one hired, if the former has perished.

1135. The traveller may only use the animal in accordance with the terms of the agreement.

1136. A beast of burden may be hired for the transport of a load determined by number, weight, or measure, or agreed upon at sight.

1141. Without the driver's consent, it is illegal to change the destination, even though the distance be the same.

1142. The driver is not entitled to take someone else on the pillion or to place an extra load on the animal hired.[1] If the driver does so, the hiring price for the extra load is due to the person who has hired the animal, provided the animal was hired to carry some specified load and no more.

1143. Above rules are also applicable to transport by water.

1144. An individual who hires an animal for transport purposes is responsible if he hires out the animal to a third person who does not offer sufficient security, or if the animal perishes owing to a longer journey, or a heavier load than the one agreed upon. If the animal has not actually succumbed or if the load was not of such a nature as to cause the death of the animal, the owner of the animal is only entitled to a compensation for the excess but cannot claim the value of the animal. If, however, the owner sustains considerable loss owing to delay, he may either claim compensation or the value of the animal as estimated on the day of the agreement.

1145. In the following cases a hiring agreement may be rescinded: if an animal is in the habit of biting, or is restive, or has defective eyesight, or suffers from some serious disease.

[1] Since the person hiring the animal is 'the owner of the animal's back.' (Perron, IV. p. 614.)

Section III

Of Leases of Land

1147. A letting agreement or lease of immovables, i.e., land and houses etc., may be made in the same form as a sale, whether the contract is to include the whole or only an undivided share of the property. The rent for the whole term shall be due, even though the lessee or tenant takes possession for one day only, provided he has been guaranteed undisturbed possession for the whole term.

1148. It is not necessary to specify the day upon which the tenancy is to begin. In the absence of any indications, the term is presumed to begin on the day on which the contract was agreed to.

1149. A letting agreement may be made by the day, month or year. The agreement may then be rescinded at the option of both parties, unless anticipatory payment of the rent has been made, in which case the agreement is obligatory for a period corresponding to the sum paid.

1151. Land that does not require artificial irrigation may be lawfully let out for a period of several years, e.g. ten years ; but it is illegal to stipulate that the rent, even for one year, shall be paid in anticipation ; except in those districts where the harvest is assured, as, for example, on the banks of the Nile or other districts that are watered by rivers, springs or wells.

1152. The rent for land watered by the Nile becomes due so soon as the inundation has taken place.

1155. Notwithstanding the fact that the lessee has planted trees upon the land he has leased for a term of years, the lessor may, at the expiration of that term, lease the land to another person, subject to his allowing the former lessor sufficient time to gather all standing crops.

1156. The cleansing of drains and the necessary repairs to walls, etc,. may be stipulated to be at the charge of the lessee ; but the expenses thus incurred are to be deducted only from the rent that has fallen due, never from the rent that has not actually become due, nor may the lessee be made personally liable for such expenses.

1158. A lessee may not, unless specially authorized by the terms of the agreement, put up any buildings or make a plantation upon the land leased, if by so doing he might injure the property or act contrary to custom.

1159. A letting agreement concluded by an agent who acts collusively or who agrees that the rent shall be payable in kind, can be rescinded. Annullable is also a lease by which the lessor is to have the benefit of improvements made by the lessee, after the expiration of the lease.

1160. A yearly lease of land that is not artificially irrigated deter-

mines with the harvest ; if the land is artificially watered, the yearly lease ceases at the expiration of the twelfth month ; a delay shall, however, be accorded to the out-going tenant until the crops have reached maturity, subject to his paying a proportional rent for the prolongation of his term.

1161. If seeds are blown about by the wind and grow up after the expiration of the term, they belong to the proprietor of the land. This also applies to the case where seeds are carried in by the water from adjacent land.

1162. The obligation to pay rent arises from the fact that the lessee was placed in a position so as to enjoy his lease, whether he, in fact, availed himself of the lease or not.

Thus, the tenant cannot urge that the harvest has been destroyed by the act of God, as where, for instance, the inundation of the Nile has only taken place after the ploughing season. Nor can he urge that he has been put in prison, etc.

1163. In the following cases the tenant shall, however, be entitled to a reduction of the rent proportional to any loss sustained since the agreement ; (*a*) where part of the rented dwelling has fallen down, or (*b*) where the lessor has himself occupied part of the house, or (*c*) where the lessee has been unable to use the upper story, there being no staircase, or (*d*) where part of the rented land has suffered from lack of water owing to incomplete or tardy inundation by the Nile.

1164. If the lessee is seriously troubled owing to the roof of the house being in a bad state of repair, he may rescind the contract ; if he prefers to stay on, he must pay the whole rent agreed upon.

1165. The tenant is entirely freed from his obligation to pay rent, if the harvest has been totally or for the greater part destroyed by some noxious cause inherent in the soil, such as insects, rats, or lack of water.[1]

1166. The lessor cannot be constrained to effect any repairs, even the most necessary ones ; but if he does effect them before the lessee (or tenant) quits, the latter cannot rescind the letting agreement.

1168. If arable land has been let for a term of several years, and if the wells or springs by means of which the tenant intended to irrigate the land have dried up or fallen in after sowing the land, the tenant is entitled to apply one year's rent to repairing the damage, but no more.

Section IV

Of Disputes

1170. The statement of the following persons shall be accepted until the contrary is proved ; (*a*) of the messenger who maintains that

[1] This freedom from paying rent also arises where cultivation cannot be effected owing to war or revolution. (Perron, IV. p. 632.)

he has carried out his instructions ; (*b*) of the workman who maintains that a thing has been entrusted to him with a view to his working it up, whilst the other party contends that the thing was delivered to him by way of deposit. The workman's word shall also be accepted as regards the kind of work to be done or the price agreed upon, provided his allegations appear to be reasonable and the thing is still in his possession.

1171. If disputes arise with regard to the execution of some work such as a construction, or with regard to an object which the workman alleges having returned, the employer's word shall be accepted, even though he may have handed over the object to the workman in the absence of any witnesses.

1172. If a workman uses an object which he asserts was entrusted to him subject to his working it up, and if the owner of the object maintains that it was stolen from him, the latter has the option either of claiming the original value of the object and abandoning it, or of taking it back as it is, and paying the workman for his labour and other expenses incurred in connection with the work done.

1174. The statements of a workman or driver to the effect that they have not been paid for their work shall be accepted, subject to plaintiff and defendant making oath.

1175. If, however, some time has elapsed since the object was returned to the owner, or since the driver delivered over his goods, the owner's or traveller's statement as to payment shall be accepted, subject to their making oath.

1176. If the driver maintains that the hiring price for the journey to Barka was agreed at so much, whilst the traveller asserts that the driver undertook to furnish transport as far as Ḳairawân for that amount, each one shall be called upon to affirm their allegations on oath. If both refuse to swear, the contract shall be annulled, even though the hiring price may have been paid in advance, provided that the journey has not been begun, or if begun, that the distance travelled is but very short.

1177. If the distance already travelled is considerable, the traveller's statement shall be accepted. With regard to the destination agreed upon, the driver's word shall be undisputed if it appears to be reasonable and if the hiring price has been paid in advance.

1178. If the hiring price has not been paid in advance, the traveller's statement shall be accepted subject to his making oath, and the driver shall be bound by such oath unless he swears to the contrary, in which case he shall receive a sum in proportion to the distance travelled, and the contract for the remainder of the journey shall be annulled.

1179. If the allegations of either party are equally unreasonable, both parties shall be called upon to make oath, and if they both make oath or if both decline to do so, the contract shall be annulled and the

distance travelled shall be paid for according to the customary hiring prices.

1180. If the driver, having reached or being about to reach Medina, maintains that such and such a sum was stipulated for the transport to that destination, whilst the traveller asserts that a lesser sum was agreed upon for a longer journey, to Mecca for instance, then the driver's statements shall be accepted, provided the hiring price was paid in advance and the allegations of either party appear to be reasonable. Both parties, however, shall be called upon to make oath, and if the driver affirms his assertions on oath, the contract for the remainder of the journey shall be cancelled.

1181. If payment for the transport has not been made in advance, and if, nevertheless, the allegations of either party appear to be reasonable, then the driver's word shall be accepted with regard to the destination agreed upon, whilst the traveller's statement as to the hiring price shall be undisputed. The traveller shall only be bound to pay a sum in proportion to the distance travelled ; moreover, both parties shall be called upon to swear to the truth of their allegations.

1182. If the driver's statements alone appear to be reasonable, they shall be accepted, both as regards the destination and the price agreed upon, subject to his making oath. In this case it is not necessary to distinguish whether the price has been paid in advance or not.

1183. In case both parties should support their allegations by the testimony of witnesses, the Ḳâḍi shall take the bona fides of such witnesses into consideration.

1184. Where disputes arise with regard to a verbal letting agreement of land or houses, and neither side can prove their allegations, each party shall be called upon to make oath and the contract shall be annulled.

1185. If the disputes should arise after the lease has been entered upon but before any rent has been paid, the lessee's statement as to the rent already due shall be accepted, provided such statement is reasonable, and provided he swears to the truth of his allegations. If this is not the case, the lessor's statements shall be accepted under the same conditions. If the allegations of either party seem to be equally reasonable, then the lessee shall pay to the lessor a customary rent for the time he was in possession. In any case the letting agreement shall be rescinded from the day when the dispute arose.

1186. If the rent has already been paid, shall the lessor's statement be preferred ? Jurisprudence varies on this point.

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CHAPTER XXXIII

CONDITIONAL AGREEMENTS (*JA'L*)

Ibn-Arfâ's definition: A conditional agreement is a unilateral contract involving consideration, by which one person requests another to do some act in return for a remuneration offered conditionally upon the integral execution of the said act, thus excluding *pro rata* payment.[1]

Section I

Of the Object of the Contract

1187. ANY person capable of concluding a hiring agreement may undertake to pay a specified remuneration to the person who, having known the offer made, shall have done the act requested.

1188. Thus freight only becomes due if the cargo reaches its destination.

Shaikh Dasûkî: § 1. No freight is due for goods lost by shipwreck whether the shipwreck took place during the voyage or after reaching port, provided it occurred prior to the possibility of landing the goods. If the ship is wrecked after reaching port and after the time necessary to effect a landing has elapsed, the whole freight is due. No responsibility attaches to the master in this case.

§ 2. Jettison is permissible in case of imminent danger, and the loss resulting therefrom constitutes general average sacrifice, to which each owner of the goods shall contribute in proportion to the value of his share in the cargo.

§ 3. It is never permissible to throw human beings overboard, whether they be men or women, free men or slaves, Muhammadans or Unbelievers, since the principle universally accepted maintains that it is under no circumstances lawful to sacrifice the life of one individual in order to save the life even of a great number of people.

1189. If an individual, engaged at a given salary to do some particular work, abandons same before completion, and thereupon the employer engages another individual to finish the work at a higher salary, the first individual is entitled (for his share of the work) to a

[1] Cf., *si facies dabo* in Roman Law.

remuneration proportional to that paid to the second individual.[1]

1191. In a conditional agreement no delay may be fixed within which the work must be completed, unless it is understood that the person engaged may at any time withdraw, subject to his receiving a remuneration in proportion to the work actually done.

1192. No remuneration may be stipulated to be payable in advance.

Section II

Of the Object of a Conditional Agreement

1193. All circumstances which allow of an *ijârah* contract being made may also give rise to a conditional agreement, but the converse is not true.

1194. Thus, the object of a conditional contract may be the execution of some work, but not an enterprise such as the retail sale of a great quantity of goods, the remuneration for such sale to become due only after the transaction is completed.

Section III

Of Disputes.

1196. The person who, though unaware of the conditional offer made, executes the work requested, shall be entitled to a just remuneration, provided the work is executed in the course of the claimant's profession.

1197. If disputes arise as to the sum promised, a customary remuneration shall be due, subject to each party making oath.

1199. The person who executes the work without being aware of the offer, and who in so executing it acts outside his profession, is only entitled to have the expenses incurred refunded.

1202. A conditional agreement binds neither party, but the offer cannot be withdrawn once the work has been taken in hand.

[1] The instance given in rule 1189 forms an exception to the general principle prevailing in conditional agreements by which no remuneration can be claimed until the work stipulated for has been entirely completed. (Perron, IV. p. 648.)

CHAPTER XXXIV

WASTE LANDS (*MAWÂT*)[1]

SECTION I

OF THE RIGHT TO OCCUPY WASTE LANDS[2]

Sub-section 1.[3] Of the vivification of land. Of the extension of the right of possession.[4]

A RIGHT of occupancy carries with it an option to the adjacent waste lands. In the case of a centre of population the option exercised by the community extends to a rædius of one day's march, within which area land cannot be taken up except with the leave of the sovereign.[5] Similar easements exist in the case of wells and trees that have been planted or tended.

Sub-section 2. Of property[6] acquired by concession.

[1] The subject of land tenure in Muhammadan Law (Sections I to III) is now of but purely academic interest to us in Nigeria.

As Zeys writes (II. p. 174): 'The problem of real property is hedged about with difficulties, moreover, the texts at our disposal are eminently contradictory.' The results of European research are scarcely less so; cf., Worms, de Sacy, de Hammer, von Berchem. It may, however, be confidently stated that the system by which the government of Northern Nigeria has nationalized the land conforms in almost every particular to the legal concepts of the Mâliki School. To quote Zeys's text book again (II. p. 181, note 1): 'if we had wished to keep up Muhammadan traditions in Algeria, we could have *sequestrated* the whole of the lands, or rather we could have continued the *sequestration*, for Algeria was conquered by Islâm.' By *sequestration* is meant that the whole of the land of a conquered country at once comes under the régime of *territorial wakf* (see p. 78). The sovereign can then only concede rights of occupancy, *iḳṭaʿ*, in consideration of the payment of rent, *kharâj, kurḍin ḳasa.*

[2] In Mâliki and Shâfiʿi Law the permission of the sovereign is not absolutely necessary in order to clear uncultivated lands and acquire their usufruct through the vivification or re-vivification of the lands so cleared, but he who has obtained an *iḳṭaʿ* is always in a privileged position. The right to the usufruct of the soil is lost if it is not directly made use of. Cf., Worms, typed copy, p. 194 et sq.

[3] Cf., Perron, V. pp. 5, 6, and Zeys, II. p. 172.

[4] This extension of right may be said to correspond roughly to our *affirmative easements*; in Arabic, *ḥarîm.*

[5] i.e in practice, the village headman. These rights of occupiers, or *easements*, as they have been rendered, are well-known and respected in Nigeria.

[6] Attention is drawn here to the fact that landed *property*, in the sense in which we use the term, is unknown in Muhammadan lands; for to them, *property* but means the possession of the usufruct. (Perron, V. p. 529.)

Section II

Of Public Lands [1]

Section III [2]

Of the Proceedings and Works that constitute and characterize the Development of Waste Land

Development takes place [3]:

(*a*) when water has been made to well up or come to the surface, or has been collected, for example, by means of a well, in order to be used for purposes of cultivation;

(*b*) or when water has been drained off permanently submerged land in order to develop such lands;

(*c*) or when waste land has been built on;

(*d*) or when a plantation has been made, no matter its size or importance or that of any constructions that may have been raised;

(*e*) or when the land has been properly ploughed, that is to say, when the soil has been broken up by the plough and the clods turned over;

(*f*) or when the bushes and trees that encumbered the ground and made it unsuitable for cultivation have been cut down or destroyed, or even merely burnt;

(*g*) or when the stones that encumbered the ground have been broken up or when the surface has been levelled and made even.

To surround a piece of waste land with a wall or to use its wild grasses or thorns, etc., as pasture, or to sink a well for the use of cattle or of men, these acts do not constitute the fact of development. But whether these three actions together would constitute development is uncertain.

Section IV

Of Things and Actions that are permitted in a mosque, or that are unlawful or censurable; the mosque considered as a Sacred Place and as Public Property [4]

A man may take up his residence in a mosque in order to be able to pray there at night, or to read and teach the Korân.

[1] *Public lands* are those waste lands which the sovereign may set apart for the public good. The conditions under which the sovereign may declare lands to be *public lands* are: (*a*) that their setting apart is due to a real public need; (*b*) that their area is but small; (*c*) that the declaration applies only to lands that are absolutely uncultivated and unused. (Zeys, II. p. 175.)

[2] The remainder of this chapter is from Perron, V. pp. 11–23.

[3] And the usufruct acquired.

[4] The slight thread which serves Khalîl to link this section to the others is as follows: waste land, which is no one's property in particular may be occupied by the first comer. In a mosque the Believer has also the right to occupy any place that is not already taken. Khalîl thus assimilates a mosque to waste lands. (Zeys, II. p. 176.)

A marriage contract may be entered into in a mosque, but a business debt may not be paid in the building nor may money or goods be exchanged : such transactions would at least be censurable. The Believer may kill a rat, snake or scorpion in a mosque.

In isolated and little frequented localities the Believer may sleep in a mosque during the heat of the day as also at night ; he may receive passing travellers and entertain them.

A stranger to the locality may also make use of the mosque for secular purposes, he may eat and drink there and may even introduce a vase in which to urinate if he is in fear of lions or other dangerous beasts, it matters not if the vase is a leaky one and the contents get spilt.

The Believer may take up his residence above a mosque, but not below.

Even in a ruined mosque it is forbidden to the Believer to pass flatus with intent ; the holiness of the spot and the presence of the angels must be respected.

It is a blamable act to spit on the pavement or on the mats or on the cobbles, but it is permissible to spit between the cobbles and under the mats.

Buying and selling are unlawful, but it is permissible to give one's consent to a sale.

Lost things may not be claimed, nor even described, in a mosque.

A fire may not be lighted in a mosque except to give light or to burn perfumes.

Horses, mules and donkeys may not be introduced into a mosque, but, according to Mâlik, camels and oxen may be introduced, for their dung is not unclean.

Section V

Of the Use and Distribution of Water

Sub-section 1. Of the principles and circumstances which regulate the use of water on a property or beyond the limits of a property.

Every proprietor of a reserve of water, be it tank, cistern, spring or pool of any shape or size, or of a well, or of a rain fed stream or torrent, or of pools fed by such waters, no matter whether these waters are on a property whose owner is in full possession or whether he has only the life interest in the estate, has the right to refuse the use of such waters to any or every one ; or he may consent to their sale to anyone he pleases at his discretion, just as if the water was in his actual possession, as in a pot, a jar, a water bag, or bowl. From the point of view of religious charity, it is expedient and meritorious in a proprietor not to refuse the use of his water to others.

But this right that the law confers on the proprietor, of refusing

the use of his water, or of selling it at his discretion, becomes of no effect when any such refusal might mean death to an individual through being compelled to go and drink at another well further off, or through his having no money wherewith to pay for that which is a necessity to him. In such circumstances, water must be abundantly provided without payment, and all ulterior claims are forbidden. On the contrary, if the individual has money wherewith to pay, the water, according to Ibn Yûnus, should be paid for.

In the same way, the surplus water from a well used for the purpose of watering plants should be left by the proprietor to his neighbour whose cultivation, within easy reach of such a well, is in danger of being parched up, his own well having fallen in or being in ruins, but its repair having been already undertaken.

We say that the surplus or what is left over of the water must of necessity be relinquished to the neighbour, and the latter should pay its value if he is able to. As to this last condition, however, it is contrary to the *Mudawwanah*; the *Mudawwanah* positively lays down, in the case of necessity under consideration, that the neighbour need never pay for the residue or surplus of water which must be relinquished to him, for the risk of seeing his crops perish from want of water is not the outcome of any voluntary act on his part; the danger which he runs by the falling in of his well cannot be compared to that incurred by the traveller, for the latter has of his own free will set out on his journey, and, moreover, he knew that he would have to purchase the water of which he had need and he should have taken the necessary precautions so as to be able to meet these incidents of the voyage. On the other hand, the neighbour above mentioned has only a right to the water under consideration if he had sown his crops with due regard to local circumstances, near a spot where there was water or where there was a well, and then finds himself in peril through an accident that he could not have foreseen.

Similarly, the surplus water in a well used for the purpose of watering cattle, for example, or in a reserve of drinking water situated in a desert place, must be relinquished without payment and of necessity to whosoever comes there to draw water, or to water his flocks or herds, or to drink; that is, if the individual who has sunk the well cannot prove that he is the owner of the soil. In such a case, however, the owner would have neither the right to sell nor to give, nor to leave as part of his inheritance either the well or the water; for his original intention had only been to obtain enough water to meet his own needs.

All that has been said relative to the right or otherwise of refusing to others the use of the residue of water in any well, does not in any way invalidate the fact that the sinking of a well on waste land constitutes development of waste lands.[1]

[1] See Sect. III. (*a*), p. 254.

Sub-section 2. Of the rights of precedence in the matter of the employment or use of surplus water.

Travellers have the right, before all others, to surplus water, after the owner of the water has satisfied his needs; this right of first use is left to travellers, whether rich or poor, in order that their journey may not be retarded. They have also the right to borrow from the owner of the water the necessary appliances, ropes, buckets, troughs, etc., but not if these appliances have been made and supplied for the purpose of being hired out, for then travellers are obliged to pay for their use. After travellers, the right of use devolves on those that are present. After men's thirsts have been satisfied, the same order of precedence must be observed for animals; first, those that are the property of the owner of the water are watered, even should they exhaust the water, they may drink their fill; after these, the animals belonging to travellers are watered; and after them those belonging to people present or passing. And in every circumstance the right of precedence holds good, even though one or the other might exhaust the water whilst satisfying his needs.

If there is little likelihood of any surplus being left after the actual needs of the owner have been satisfied, the right to the first use of the water belongs to whosoever, in the order of precedence, would have the most to suffer or to lose. Thus, whether it is the owner or another who is in the most pressing need, it is that owner or that other individual who is to be the first to profit by and use the water.

Sub-section 3. Of the use of rain-water—whether collected on *mawât*, that is, on vacant land—or brought, by works undertaken in common, on to lands that are occupied.

When rain-water has collected on *mawât* or ownerless land, the occupier of the nearest farm lands has the first right to the water, in order to irrigate his plants, fields, or trees; for this purpose he may take water sufficient to cover his cultivated lands ankle deep. But this right of first use only devolves upon the nearest occupier if he was the first, or among the first, to develop his land, that is to say that he had already developed it when his neighbours had not yet developed their adjacent lands, or if all were developed at the same time. If the land which is the furthest off was the first to be vivified, its occupier would have the first right to water his land, but only if the cultivation on that furthest off land was in danger of being parched up; were it not for this, the right of first use would go to the occupier of the nearest land to the water. If the place where the rain-water is collected is not *mawât* but occupied land, then the use of the water is at the discretion of the occupier of the land where the rain water has collected.

The occupier of the land situated nearest the water, and who was the first to develop his land, may be ordered by the Court to make

even and level the surface of his land, if such levelling be possible; if not, that is, if such levelling cannot be carried out and thus the irrigation of that portion of the land nearest the water cannot be done ankle deep without the other part receiving a greater depth, that land will be considered as forming two properties, and thus each will be watered in its turn according to its position and nearness to the water.

Should there be several fields or gardens equally near and fronting the rain-water collected on *mawât*, the water is shared by all at one and the same time; there is no longer any right of precedence, not even if one farm had been developed before another.

The same rule holds good in the case of the waters of the Nile, that is to say that all the rules that regulate the use of rain-water apply also to the use of the water of the Nile for irrigation purposes.

When water has been taken possession of beforehand, that is to say when, for example, several persons have worked in common in order to lead the water on to their lands, there is then, for none of them, any question of the right of first use; all share the water in quantities proportional to the area of each one's land, measured by the length of time of flow by an hour-glass. In such a case, if the land had originally been held in common by the same persons and if then they had partitioned it up after they had held the water in common, then the flow is measured from the moment it began, no matter how far off the parcel of land may be to which the water is being led; the reason for this being that the matter of irrigation had necessarily been taken into consideration ere the partitioning of the land was effected. But if the lands had never been held in common, the length of time of the flow only begins to count from the time the water reaches the parcel of land to be irrigated. Therefore, in this latter case, one always takes into consideration the difference in length of time of the flow in order to appreciate the time during which the water shall be turned on to each holding.

When owners as above each wish to be the first to irrigate their fields or their trees, lots are drawn and each irrigates his fields in the order that chance designates; each receives a quantity of water equal to the height of the ankle above the ground. Lots are drawn by means of bits of paper equal in number to those interested and upon which the names are written, then the order in which the names are drawn indicates the order in which each receives his share of the water.

Sub-section 4. Of fishery rights.[1]

No one has the right to prohibit fishing in streams, pools or rivers that he does not own, for the water and the fish are then *mawât*, and the first occupant or the first to catch the fish is the lawful owner.

[1] Fishing and hunting are both included under the term *ṣâda*. (Zeys, II. p. 179.)

The right to fish should not even be denied when the waters are situated on a property or on land of which only the usufruct is held ; for the sale of fish before they are caught is prohibited, even if the owner of the land had put fish into the waters and they had there multiplied, or if the fish themselves had got into the waters.

It has been asked :—Is it only in a country conquered by armed force that no one has the right to prohibit fishing, or is it so in all countries whether conquered or not by armed force ? Or again, has the owner of the waters only the right to prohibit fishing when he himself wishes to fish ? As to this, there are different views. But the spirit of the Law is that no one has the right to prohibit the taking of fish. The right to fish in proprietary waters can only be prohibited when damage might be caused to cultivation, or when the exercise of the right might cause annoyance or harm to the occupier of the land ; for example, if the latter's wife could be discerned.

Section VI

Of Rights of Pasture

No one has the right to oppose the grazing of herds on his lands that are no longer cultivated, if the grasses thereon grow wild, or on lands that have never been cultivated, except when the latter are completely surrounded by cultivated lands. In this case the herds in passing would damage the crops, and from this fact arises the right of the occupier to prohibit them passing. But everyone has the right to prohibit the herds of others coming to graze on his own particular meadows and pasture grounds.

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CHAPTER XXXV

ḤABS OR *WAḲF*[1]

THE foundation[2] of a *ḥabs* consists in giving the usufruct of property which is in the entire and exclusive possession of the founder for such length of time as the property may exist.[3] A *ḥabs* can even be founded conditional to contingent and eventual possession; thus the formula may be: 'if I become the possessor of such and such a house, I will make it *ḥabs*,' or again, 'I make my house *ḥabs* in favour of whoever shall inhabit it.'[4]

[1] Macdonald renders this term by *foundations in mortmain*; Hughes and Wilson both render it by *endowment*; Lane by the words *legacy unalienable by law*. *Ḥabs*, *pl. ḥubûs*, and *waḳf* are synonymous, but the former is the more usual in Mâliki countries.

Zeys and Worms both consider that the genesis of contractual *ḥabs* lies in that general sequestration of all lands which were conquered by force and which has been referred to as *territorial waḳf*, see p. 78 and p. 253, note 1.

[2] In common parlance a *waḳf* is referred to as a *pious foundation*.

[3] The proprietorship in the thing made *ḥabs* remains with the founder and fictitiously so after his death.

[4] As *ḥabs* is scarcely known in West Africa, the subject is not gone into.

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CHAPTER XXXVI

GIFTS (*HIBAH*)

SECTION I

DEFINITION

A GIFT is a gratuitous transfer of property. If the transfer is made in view of a reward in another world, it loses its characteristic as a gift and partakes rather of the nature of alms; the contract then becomes a sort of sale or exchange, it is no longer purely gratuitous. Gifts resemble *habs* in that they are both acts of goodwill and generosity.[1] A person can only legally dispose by way of gift of things that are in his possession and whose transfer is lawful.[2]

SECTION II

OF THE LEGAL CAPACITY OF THE DONOR

The donor must have full legal capacity. A man in a state of intoxication or one whose debts equal his assets, cannot make a gift. A man on his death-bed may only give away a third of his property. A woman must have her husband's authority in order to make a gift of more than one-third of her property.

SECTION III

OF THE NATURE OF PROPERTY CAPABLE OF BEING GIFTED

All personal and real property may be gifted. Even an uncertain thing may be gifted, such as a lost camel, a runaway slave; as also a thing that cannot lawfully be sold, such as a dog.

A debt may be gifted to the debtor or another person.

SECTION IV

OF THE FORMULA

A gitt is made by the use of some such words as, 'I give you this or that thing,' or by any act which comports the notion of giving.

[1] The main difference is that in *habs* only the beneficiary use of the thing is transferred, whilst in *hibah* it is the thing itself.

[2] Examples of unlawful gifts given by Khalîl are: the handing over by a husband of his wife, or by a master of his slave in process of being enfranchised, to another, for purposes of sexual enjoyment.

Section V

Of the Transfer of the Thing Gifted. Of the conditions of Revocability. Of the event of death of Donor or Donee

The donee takes possession of the gift without the authorization of the donor. The donor who refuses to allow the donee to take possession may be constrained; for to make a gift is to transfer, by word of mouth, the property in the thing given. Besides, acceptation and taking possession of the gift are of the very essence of the contract.

A gift stands cancelled if the donee has not taken possession before it appears that the donor has more debts than assets. A gift is not valid: (*a*) when made to a second donee who receives it in order to keep or make use of it on behalf of the first donee; (*b*) when a slave who has been gifted away becomes pregnant by the donor before she has come into the possession of the donee.

A gift is invalid if, before it is taken possession of, the donor is taken with an illness of which he dies.

Section VI

Of a Third Person taking Possession of the Gift

The gift is valid when the donee employs an intermediary to take possession.

Section VII

Of the Return of the Gift to the Donor

Section VIII

Of Gifts between Spouses

Personalty may be lawfully given as between spouses, even without an actual transfer from the possession of the donor. But the husband may not make gift of his house to his wife, for the wife is dependent on her husband and under his protection and is thus inferior to him.

Section IX

Of Gifts made by a Guardian to his Ward

Section X

Of the Gift of Life Interests (*'umra*). Of Reciprocal Posthumous Gifts (*rukba*).

In the case of a gift of a life interest, the formula must be explicit.

The Law forbids any agreement by which two persons agree to leave to the survivor of them the whole or part of their property.

Section XI

Of Gifts made in Consideration of a Reward

Gifts may lawfully be made in consideration of a reward, but the

reward must be accurately specified. Such a gift will not hold good if made between spouses.

Section XII

Of the Revocation of a Gift [1]

A father alone has the power to revoke a gift made by him to his child.

Section XIII

Of Alms, (*ṣadaḳah*) [2]

The return of alms to the giver is to be blamed. The recipients of alms may do as they please with them.

Section XIV

Of the Gift of a Slave to a Child

[1] As a general rule, a gift is irrevocable in Mâliki and Shâfi'i Law, but not so in Ḥanifi Law. The Prophet has said : 'He who takes back what he has given is like unto the dog that eats his own vomit.' (Zeys, II. p. 203.) Cf., also 2 Pet. ii. 22 and Prov. xxvi. 11.

[2] See p. 51, note 2.

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CHAPTER XXXVII

LOST PROPERTY (*LUḲṬAH*) [1]

SECTION I

OF LOST MOVABLES AND STRAYED ANIMALS

Sub-section 1. Of what is generally understood by lost property.

LOST property is that which, being the lawful property of the loser and which consequently can only be claimed by him, is found abandoned there where it was lost. Exception is made to treasure trove and things found in the enemy's country; strayed cattle[2] and movables, entrusted to the care of a watchman, are not included. On the other hand strayed horses, donkeys and dogs may be classed as lost property.[3]

Sub-section 2. Of the restitution of lost property.

Lost property must be restored to its owner without his being called upon to swear to the ownership thereof, when he describes and clearly indicates the covering material, the manner in which the lost property is tied up, and the number of articles of which the lost property is composed; when other indications bear out the owner's claims, it is all the more incumbent on the finder to restore the property. Lost property must be restored even when the owner only describes the cover and tying up of the property. Should the lost property not be covered up or contained in a receptacle or tied up, it is sufficient for the owner to furnish such a description as to make one think that he is not mistaken.

When two persons lay claim to the same lost property and one describes the cover and bands, whilst the other specifies the number and weight, the former claimant will be preferred and the property attributed and restored to him.

[1] It is the duty of every Believer to pick up and take care of lost property in order to return it to the lawful owner when he claims it. The finder never becomes the owner of lost property. (Zeys, II. p. 205.)

[2] Strayed cattle and sheep do not come under the head of *luḳṭah*, but it is certain that they must be fed and cared for. (id., p. 206.)

[3] Ibn ʿArfa's definition is as follows: waifs are lost goods that come under the special protection of the Law; human beings and cattle are never considered waifs.

When two persons have each given the same description of the lost property, but the first of them, by reason of the description by him given, has already taken possession of the lost property but has not yet gone away, in such a case the two claimants must each swear that the property is his; the property is then divided between them and it would be so divided even if both refused to swear. If only one claimant swears to the ownership, it is to him that the property is restored. If the first claimant has gone away with the property, or if he has not yet gone away but his description of the property could have been bruited about, the property remains in his possession and the second claimant cannot demand it.

Whenever lost property has been restored to a claimant who had furnished a satisfactory description from which one had been led to believe that the claim was made in good faith, the finder of the property is guaranteed against all further claim, even though a new claimant should furnish indisputable proofs of his ownership and should thus demonstrate that the property was rightfully his. No claim in this case can be made against the finder of the lost property, for the latter had restored it under reasonable and lawful circumstances. When a claimant can only furnish one of the two first and essential indications, that is, when he can only describe the cover *or* the method of tying, the restoration and handing over of the lost property must be postponed; a certain time must be allowed to elapse with a view to an ampler description being given. Should another claimant furnish a more precise and satisfactory description, the lost property should be handed over to him; should the description be less precise than that given by the first claimant, it is to the latter that the property is restored.

But in the event of a description differing from the reality, that is to say, if the cover is described as being so and so and in reality it is quite otherwise, there is, according to Ibn Rushd, no necessity to restore the property nor to postpone its restoration; the claim is simply ignored. An error in the precise description of a gold or silver piece of money is of no account. It matters little whether the claimant ignores the number of objects or articles contained within the lost property, so long as he can indicate and describe the exterior envelope and bands, or the one or the other.

Sub-section 3. Of the duties that devolve upon the finder of lost property.

Everyone who is of sane mind and who has reached the age of puberty must consider himself as obliged to take care of lost property that may be discovered by him, if he has any reason to fear that the dishonest may take possession of it, and if again he himself is convinced that with him such property will be in

safe keeping; for protection is due to the property of others. If the finder should fear that he himself may prove dishonest and may eventually be led to appropriate the lost property, whether he apprehends or not that it may fall into hands still more unworthy than his own, he is explicitly forbidden to touch the lost property.

The finder is bound, during one whole year dating from the day on which the lost property was discovered and taken possession of, to publish and make known, without, however, mentioning any specific characteristics of his find, that such and such an object has been discovered, even though it should be but a bucket, or a simple haversack; but it is not thus, and publication is not obligatory, when the object is of but very small intrinsic value, such as a stick, a whip, or any article that is worth less than a legal *drachma*. If the object of trifling value consists of fruit for example, and the finder does not know to whom they belong, he has the right to eat them.

Publication should be made in those places where it is most likely to be heard, for example, outside the mosque, and should be done every two or three days by the finder himself, or by an upright and honest man, or by one who is paid as town crier, if the finder cannot, or cannot on account of his rank and condition, himself undertake the publication.

Should the lost property have been discovered in the district intermediate between two localities, publication as above set forth should be made in both localities.

Lost property found by a Muhammadan in a district inhabited by tributary non-Muhammadan subjects must be given up into the hands of their most enlightened religious chief, whether he resides or not in the district itself. The Muhammadan finder must not publish the news, for a Muhammadan must never even appear to be in the service of Unbelievers.

Sub-section 4. Of the safeguard of lost property.

After publication continued during a whole year, the finder of lost property has the choice, either: (*a*) to retain it and keep it by him until the owner should make his claim, or (*b*) to give it in alms, either in his own name or in that of the owner, or (*c*) to appropriate it. In these two last cases the finder continues to stand good for the value of the lost property. If the lost property has been found by the chief Imâm, he has only the choice of keeping it by him or of selling it and depositing its value in the *Bait al-mâl*. A runaway slave who has been caught by anyone but the Imâm may lawfully be sold[1] by the finder.

The duties of a slave are the same as those of a free man with respect to lost property, The difference, however, is this; if the lost property gets lost or perishes before a year has elapsed the guaranty

[1] But see pp. 158, 271.

differs in form, it is the person of the slave that pays for the loss ; the guaranty is exacted from him, even in spite of his master ; that is to say, that the slave may be sold if his master does not pay the damage caused by this kind of loss.

The finder of lost property, whether a slave or free man, has the right to eat or consume such lost property, even in an inhabited district, when the property is of such a nature as to be liable to prompt deterioration, for example, fruit, meat, etc. ; there is then no obligation to publish the finding of the property. If, on the other hand, there is no risk of deterioration and yet the finder consumes that which he has found, he renders himself liable to the owner ; thus it is in the case of a lost sheep found in a desert or far off place, whether the finder eats it in the desert or whether he eats it in an inhabited district ; but if the finder takes the beast to an inhabited place and is met by the owner, the latter has the right to take back his sheep whilst paying for the cost of its transport ; should the finder carry the sheep alive to an inhabited locality, he must publicly announce his find.

Again, the liability is the same if the finder kills a lost head of cattle found in a place where it is liable to attack by lions or to perish for want of food and water, but if no danger can be foreseen or presumed the animal should be left where found, even though it be in the desert.

To the finder of lost property belongs the simple and daily produce of his find, but not of its offspring. Thus, to him who finds a lost sheep or cow belongs the milk, cream, butter and cheese given by these animals, but not their offspring, nor yet the wool, nor the price of their hire.

The owner of lost property that has been kept at the expense of the finder can either take back his property and pay the expenses or can abandon his rights to the finder. If the owner thus abandons his property to the finder, he has not the right to reclaim it at a later date.

SECTION II

OF FOUNDLINGS. (*Laḳîṭ*) [1]

SECTION III

OF THE APPREHENSION OF FUGITIVE SLAVES. (*Âbiḳ, Harab*) [2]

[1] The finder of a foundling becomes the child's foster-father. If the foundling is found to be the offspring of a slave, the child is no longer a foundling but a chattel. (Cf., Zeys, II. pp. 208, 209.)

[2] The general term 'fugitive or runaway' is meant to include the slave who has left his master and escaped, though Muhammadan Law establishes a distinction between the *âbiḳ* and the *harab* slave. A slave is said to be *âbiḳ*, or escaped, when he runs away secretly and without motive ; he is said to be *harab*, i,e. in flight, fugitive or runaway, when he secretly runs away on account of some reason.

But the application of the Law with respect to the apprehension of slaves

Sub-section 1. Of the obligation to capture the fugitive slave and to deliver him over to the local authority. Of the enfranchisement of fugitive slaves. Of the culpability of the fugitive slave.

Anyone who meets a fugitive slave and knows who his master is, should stop the slave and take him back to his master ; this being in accordance with the principle of the mutual protection of chattels. But if, on the other hand, it is not known who the master is, there is no longer any obligation to stop the fugitive slave, on the contrary, there is blame in doing so. If the slave has been stopped, he should be placed as a matter of expediency, even though he may be claimed, in the care of the Imâm or first local authority who will keep him and maintain him during a whole year, after which he will be sold. If the slave be sent away or be sold before the expiry of a year, the authority becomes liable for the slave's value to the master. But the matter does not thus end through the sale of the slave without any further precautions being taken ; the Imâm or the local authority or chief of the district, must draw up an instrument setting forth the name of his place of origin, giving an exact description of the slave, and the name of his master ; to this instrument must be affixed the signatures of witnesses. The slave's selling price is credited to the *bait al-mâl* or public treasury ; then, if a claim be brought and the proofs are considered satisfactory, the selling price is handed over to the claimant. The cost of maintaining the slave is levied on the selling price at the time of the sale, it is not necessary to wait until a claim be made on account of the slave. In the same way are levied the costs of publicity and the charges of the town crier. A sale thus lawfully made is irrevocable. A master may legally manumit his fugitive slave or give him away, but the gift must be an entirely free one since it is illegal to sell a fugitive slave.

Sub-section 2. Of the responsibility incurred by one who has apprehended a fugitive slave.

Whoever has apprehended a fugitive slave is responsible for him unless he can prove that he was unable to deliver the slave up to the Imâm or to the local authority.

Sub-section 3. Of the surrender of a fugitive slave.

A fugitive slave, apprehended by a person who does not know his master, must be at once handed over to his owner on the latter claiming the slave and calling a witness to certify as to his ownership, or on

is one and the same ; besides, the words 'escaped' or 'fugitive' do not exactly render the meaning of the two Arabic words. Moreover, Khalîl always makes use of the word *harab*, as if to indicate that if the Law is applicable to the slave who has run away for a certain reason it is all the more applicable to him who has run away without reason. (Perron, V. p. 530.)

his swearing as to his rightful ownership and claim. If two witnesses are called there is no need for the master to make oath.

The slave is handed over to the one who proffers the claim even when the latter produces no witnesses and makes no oath, whenever the slave himself recognizes the claim as true.

The person who has apprehended a fugitive slave whose master he does not know, though his action is blamable as before stated, must not hand him over to one who proffers a claim to ownership until the matter has been referred to the Imâm or local authority.

Should the master of a slave who has run away into another country present himself to the Ḳâḍi of the country to which the slave has escaped, bearing a document signed by the Ḳâḍi of his district to the effect that it has been certified to him in due form that a slave has run away from the bearer of the document, the Ḳâḍi who has the slave in his charge should at once hand him over to the master, if the description contained in the document corresponds with that of the slave.

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CHAPTER XXXVIII[1]

JUDICIAL PROCEDURE (*ḲAḌÂ*)[2]

SECTION I

OF THE CHARACTER AND DUTIES OF THE ḲÂḌI OR JUDGE.

Sub-section 1. Of the moral, physical and technical qualities required in a Ḳâḍi.

THE functions of Ḳâḍi can only be entrusted to one who: (*a*) is eligible to give evidence in a Court of Law[3] and who is just and upright,[4] though he may be a freed man; the necessary aptitude and capacity can only exist in a Muhammadan who has reached the age of puberty, is of sane mind, free, and of irreproachable char-

[1] It will be seen that the whole subject of Judicial Procedure is most vague and uncertain and little help can be obtained from a study of the *Tuḥfat*, and other commentaries. By Judicial Procedure is meant the functions of the Ḳâḍi; the subject of evidence and oaths is treated of in Ch. XXXIX, p. 293.

It is necessary to make clear from the start that a Ḳâḍi does not judge according to the principles of equity and good conscience, but strictly on the evidence, and, arithmetically, according to the number and legal witnessing capacity of the witnesses. The distinction between evidence and a statement on oath is noticed on p. 284, note 2. In this connexion it is worth pointing out that our method of swearing a witness as to the truth of the whole of the evidence he is about to give is an inconceivable one to a Muhammadan. An oath is regarded in a much more sacred light and its effect is conclusive. Another point is the little reliance placed upon the written word (see Section XIV. p. 289), and owing to this and the illiteracy of all classes little or no use is made of documents. On most points of judicial procedure we may consider Muhammadan practice and ideas as the antithesis of our own. From the following pages it will be discerned how it comes about that an accused in our Courts seldom really defends himself but seeks to blacken the character and motives of the witnesses. The student is specially referred to the essay on procedure and evidence in Morand's Studies, ch. vii. See also p. 285, note 1; p. 288, note 1; and p. 289, note 1.

The chapter is here translated and summarised from Perron, but Seignette also gives a translation, rules 1385–1508.

[2] The word *ḳaḍâ* literally means 'consummating' and denotes the office of a Ḳâḍi, or, in Hausa, an Alḳali. (Hughes.)

[3] i.e. *ʿadl*; see p. 293, note 3.

[4] Uprightness or honourableness, according to Muslim authors, consists in abstaining from all grave sin and avoiding, as far as possible, all lighter faults; even 'things permitted' should be eschewed when they are contrary to propriety. (*Tuḥfat*, note 6.)

acter; (*b*) is of the male sex[1]; (*c*) is gifted with sagacity and the possession of a matured mind; a volatile and unreflecting mind would be led astray by cunning, by malice, or by speciousness; (*d*) he should be apt in the interpretation of the Law[2] and in deducing its applications. Should such a man not be found, the one who best knows the textbooks of jurisprudence of the School[3] he represents will be chosen.

For the sovereign Imâm,[4] or chief and supreme Judge of Islâm, the Law requires, beyond the conditions above set forth, that he should be of the noble tribe of the Kuraish, and, moreover, if possible, that he should be of the noble blood of the Abbasides. The whole of these conditions, however, only refer to the selection of the Imâm or Sovereign Chief[4] of the Empire. If afterwards the Sovereign does wrong; if, for example, he is guilty of exactions and spoliations, the supreme power will not on these accounts be taken from him.

The Ḳâḍi's judgments can only be based on the jurisprudence of the School which he has adopted and they must be in strict conformity with the sacred texts that are the very foundation of Law; he should never permit himself to make hazardous or arbitrary inferences.[5] A decision or sentence given by a Ḳâḍi who is blind, or deaf, or dumb, or even who knows neither how to read nor write should be carried into execution, if it is in conformity with the Law; but in these cases he should be retired.

Sub-section 2. Of the soliciting and of the acceptance of the functions of a Ḳâḍi.

Though it is blamable, it is permissible for a man to solicit the office of judge, and even to pay for it[6] if he believes that his own non-selection may lead to trouble for himself or his children or may give rise to public discontent, or that justice will not be done if another be selected.

[1] In Ḥanafi law a woman may exercise the office of Ḳâḍi, except in the administration of punishment and retaliation. (Hughes, p. 255.)

[2] And of the *Ḥadîths*, of which the most widely known collections are those of al-Bukhâri and Muslim. (*Tuḥfat*, note 8.).

[3] By 'School' is here meant one of the four orthodox Schools of Islâm.

[4] The present sovereign Imâm or Caliph is the Sultan of Turkey, whose ancestor, Salim I, arrogated to himself the title in A.D. 1519.

[5] Any tendency to judge by inference is a grave fault in a Kâḍi. What is required of him is a certain reserve, a certain distrustfulness of his own powers, which will cause him to avoid substituting his own personal convictions for the text of the law when it is obscure and insufficient. Having this characteristic, the Ḳâḍi will endeavour to seek information from one of greater learning. If he fails in getting good advice, he will abstain from pronouncing judgment. Denial of justice is thus, in fact, permitted by law. (*Tuḥfat*, rule 37, note 9.)

[6] 'The Ḳâḍi, or chief Judge, of Cairo presides in Egypt only a year, at the expiration of which term, a new Ḳâḍi having arrived from Constantinople, the former returns. . . . He purchases his place privately of the Government (i.e. of the Sublime Porte) which pays no particular regard to his qualifications. . . .' (Lane, I. p. 142.)

The man who is well versed in the science of jurisprudence may be constrained to accept office.[1]

Sub-section 3. Of the proprieties to be observed by a Ḳâḍi in his capacity as an ordinary citizen or as a magistrate.

As motives for preference and in view of the common good it is expedient that the Ḳâḍi should be :—

(*a*) a conscientious man and one who implicitly obeys the Law ; that he should be one who can put aside all specious reasonings and even those permissions that might lead him to conclusions which the Law would reprove ;

(*b*) that he should be of the same country wherein he is to exercise the functions of Ḳâḍi, for then he will be better acquainted with men and conditions, and so be in a position to judge of the relative merits of witnesses ;[2]

(*c*) that he should be in possession of means,[3] for poverty too easily allows itself to be tempted ; wealth, on the other hand, gives less cause to presume greed, confers consideration, and, when allied to piety, more easily permits of good being done, especially in men who are before the public ;

(*d*) that he should be calm and kind so that in his presence litigants may remain within the bonds of moderation and propriety ;

(*e*) that he should know how to maintain his dignity and his self-respect, how to inspire deference, to keep within bounds the quick-tempered, the shifty and the malevolent, and render justice to whom justice is due ;

(*f*) that he should be of a well-known and respected family ;

(*g*) that he should consult men of learning in order that he may be enlightened and his decisions directed into the true path ; even the most learned may find in one less erudite than himself an equitable explanation ;

(*h*) that he should have no debts ;

(*i*) that he should never have been sentenced to a stated punishment,[4] either on account of illicit cohabitation, or of some outrage or insult ;

(*j*) that he should not be too sharp and searching of eye ; for then he might be led into judging people by their physiognomies, and might deviate from the rules of Law by neglecting to enforce the production of judicial proof in support of allegations ;

[1] Ibn ʿÂṣim [a] writes that he had the *misfortune* to be nominated Ḳâḍi of Cadiz at the age of sixty. A tradition of the Prophet runs : of three Ḳâḍi, two will go to hell, one only will enter paradise. (*Tuḥfat*, note 4.)

[2] Cf., p. 276, note 5 ; p. 279, note 1.

[3] Ḳâḍi receive no salaries, cf., p. 276, note 3 ; but see also p. 79, note 3, and p. 167, rule 240.

[4] *Ḥadd*, see p. 347, note 7.

[a] Ibn ʿÂṣim was the author of the *Tuḥfat al-Ḥukkâm*, which is written in verse. He was a native of Granada, and died in A.H. 829. (Brockelmann.)

(*k*) that he should not be given to malevolent prejudices and should be free from the tendency to suspect evil;

(*l*) that he should avoid all relations with litigants.

It is further expedient that the Ḳâḍi should have attached to the Court the least possible number of officers and attendants[1] such as messengers,[2] deputies or assessors, to carry orders or to cite the parties to appear, for all these individuals live by their skill in stirring up and sustaining disputes and causes, in disfiguring and deforming the very principles of Law.[3] The Ḳâḍi should also remove and exclude from the Court those of his officers who have long been there,[4] for they can only be employing themselves in evil intrigues.

It is at least expedient that a Ḳâḍi should have about him men who can inform him of what is being said about his conduct, his judgments and decisions; also what the public think of his certifying[5] witnesses. He should also punish those who, in his presence and when in the exercise of his functions are wanting in respect, and thus ignore the respect due to the representative of the Law.[6]

Within his jurisdiction, a Ḳâḍi cannot authorize a substitute unless the district is of very considerable area.[7] In no case whatever may a Ḳâḍi authorize a substitute with the object of lessening his own work or allowing himself a holiday.

[1] The Ḳâḍi's Court in Cairo in the days of Mehemet Ali consisted of the Ḳâḍi, sent yearly from Constantinople, who had little to do but to confirm the sentence of his *naḳîb* or deputy or the decision of the *mufti* (chief doctor of law). Then in order of importance came the *Bash-Turjumân* [a] or Chief Interpreter; the *Bash-Rusûl* [a] or chief of the bailiffs or sergeants who execute arrests; the *Bash-Katib* [a] or chief secretary under whose orders were the *Shâhid* [b] whose business was to hear and write the statements of the cases to be submitted for judgment. (Lane, I. p. 142.)

[2] The costs of a Court messenger sent to summons the defendant, are at the charge of the plaintiff; but if the defendant resists the order, the costs fall upon him. (*Tuḥfat*, rule 36.) Cf., p. 278.

Again as to costs: 'The fees, until lately, used to be paid by the successful party; but now they are paid by the other party.' (Lane, I. p. 145.) This remark refers to the practice in Cairo in 1835.

[3] It seems improbable that any of these officers received salaries; thus from the earliest times all those connected with a Court of Justice lived by bribery and corruption. But provisions may be allotted them, see p. 167, rule 240.

[4] In Cairo, in its best days, the place of Chief Interpreter was a permanent one, in order to preserve continuity in the customs of the Court and particularly in the system of bribery. (Lane, I. p. 143.)

[5] 'His certifying witnesses,' *'udûl*, are those that accredit witnesses whose character is not known to the Ḳâḍi. Thus the Ḳâḍi has a private spy on the Court's official certifying witnesses, who, in their turn, have to accredit ordinary witnesses before evidence can be accepted; see also Sect. v. p. 279.

[6] See page 280, note 3.

[7] It is clear that the Ḳâḍi's substitute is but the Ḳâḍi's proxy; he is not a puisne judge, i.e., one lower in rank, for there are no ranks in the Muslim Judiciary. Again it is a disputed point whether a Ḳâḍi can appoint any substitute at all. If the Ḳâḍi has received no authority to appoint a substitute, the latter's decisions must be ratified by the Ḳâḍi who appointed him.

[a] Turkish names.

[b] or *'udûl*, see p. 293, note 3.

A Ḳâḍi is not removable from his office on the death of the Emir who appointed him.

Section II

Of the Jurisdiction of a Ḳâḍi.

Every Ḳâḍi must have a separate jurisdiction[1] but the Imâm or sovereign can limit their jurisdiction in any way he pleases, either as to the district over which their power extends, or as to their powers of entertaining any judicial proceeding. No two Ḳâḍi can be associated together to hear and determine the same cause; a judge should not be the half of a judge.[2]

Section III

Of Charges, Counter-charges and Grievances with respect to the Choice of Jurisdiction. Of the Punishment by the Ḳâḍi of the Individual who refuses to pay what he owes

Sub-section 1. Of the choice of jurisdiction by contending parties.

The plaintiff[3] has the right of choice as to the Court before which he will cite the defendant.[4]

In matters that concern business interests or in cases of wilful wounding it is permissible to have recourse to an arbitrator who must be acquainted with the Law on the subject thus brought before him. Arbitration is unlawful in cases where the Law has fixed definite[5] punishments, as in the case of murder, adultery, or in cases of filiation, repudiation or enfranchisement, for in all these cases the rights of third parties have to be decided.

An arbitrator's decision is final if given according to Law; but if the arbitrator has arrogated to himself the powers of the sovereign, he shall be punished.

Sub-section 2. Of the powers of the Ḳâḍi with respect to the punishment of the individual who refuses to pay that which he owes.

A Ḳâḍi is allowed to beat with his own hand, or to flog, or to imprison a defendant who continually puts off paying that which he has been ordered to pay or deliver up. To do this the Ḳâḍi does not need judicial proof so long as he is aware of the truth of the fact.[6] The Ḳâḍi may also punish, if it be just to do so, whoever endeavours to

[1] By separate jurisdiction is meant that every Ḳâḍi finally adjudicates on every question within the powers entrusted him by the sovereign. There is no appellate jurisdiction in Muhammadan Law; cf., p. 287, note 5.

[2] A Bench of Judges is an unthinkable proposition to a Muhammadan mind.

[3] The plaintiff, or claimant, 'the *muddaʿi*, is he whose averment lacks both any ordinary and any special presumption in favour of its truth,' (*Risâlah*, p. 99) and this is not always the party suing. See p. 281, note 3.

[4] The defendant, '*muddaʿa ʿalaihi*, is he whose averment is supported by one or other of those presumptions.' (*Risâlah*, p, 99.)

[5] i.e., a *ḥadd* punishment.

[6] Cf., p. 289, note 2.

evade the terms of a judicial decision, the costs moreover will be paid by him.[1]

Section IV

Of the Dismissal from Office of a Ḳâḍi

The sovereign can dismiss a Ḳâḍi from office for the public good, even though there may have been no complaints or grave circumstances. The dismissal of a Ḳâḍi is justified by the mere fact that another, more discerning, more composed or more firm, is available. There is also sufficient ground if there be reason to fear that the Ḳâḍi is not without reproach in the exercise of his functions. Never should the sovereign dismiss a Ḳâḍi, well known by his ability and character, on the first complaint or denunciation being made against him. The dismissal of a Ḳâḍi should never appear to the people as if it was an actual out and out dismissal, or one occasioned by the sovereign's animosity or resentment, for dismissal always lends itself to the purposes of the evil-disposed and moreover depreciates the magistracy.

Section V

Of Regulations respecting, (*a*) Punishments that can be inflicted within the Mosque, (*b*) Punishments that can be inflicted at the Assizes held by the Ḳâḍi and on those who are in his Court, (*c*) the Procedure to be followed by the Ḳâḍi on the opening of the Court

Mâlik advises that the Court be held in the patio or outside court of the mosques,[2] so that Muhammadans, Unbelievers, and women ritually unclean can be present in Court. Besides, the Prophet has said: Allow no cries or disputes within your mosques.

Court should not be held on the days of the great or lesser *ṣalât*, nor on days when there is much rain, nor during the canonical hours of prayer.

The Ḳâḍi is allowed to have an usher and a porter to keep order in Court.

On a Ḳâḍi assuming his functions, he should begin by examining the charges against those under detention, and then should at once liberate those who should be allowed to go free. He should, of course, first of all, examine those papers bearing the signatures of those witnesses who are attached to the Court and whose names give authority in the arguments and decisions; the Ḳâḍi should find out who are the eye-witnesses and those who are signatories to documents in order

[1] Cf., p. 276, note 2. A judicial decision is a statement which carries with it the idea of obligatory execution; in its general sense, it is analogous to an order, with the difference that a decision or legal provision does not necessarily imply the immediate fulfilment of what it expresses. Still, a sentence that has been given should be carried out. (Perron, V. p. 531.)

[2] But a Ḳâḍi can hold Court wherever he thinks fit. (*Tuḥfat*, rule 18.)

to ascertain which of them are honest and upright men and retain them only ; for all justice in some way reposes on the value of the evidence .[1] After the Ḳâḍi has examined the charges and lists of witnesses, he will call before him the guardians of orphans. After which, the Ḳâḍi will examine into the order in which the causes ought to be taken. The Ḳâḍi will choose and appoint a scribe, honest and upright, capable of legally hearing witnesses, who will keep him informed of all causes and decisions ; he will also appoint an inspector who observes the witnesses in Court and even in their own houses, takes note of the words and acts as also of what is said about them, and informs the Ḳâḍi ; both the scribe and inspector should be chosen from amongst the most upright.

A dragoman or interpreter is appointed to the Court in order to serve as intermediary. There must also be a person whose duty it is to take the oath on behalf of those who are absent or others.[2]

Section VI

Of Assessors, of those Things which a Ḳâḍi should abstain from doing in Court.

Sub-section 1. Of assessors.

A Ḳâḍi who understands the delicacy of his functions and who is not *mujtahid*, that is to say, a man of uncontested ability, should be assisted in Court by *'Ulamâ'*,[3] men well versed in the Law, or by councillors or assessors .[4] Ibn al-Mawâz lays down that :—no Ḳâḍi should sit without official witnesses[5] or assessors in order that they may hear and retain in their memory the statements of the contending parties, so that witnesses should not go back upon their previous evidence. The presence of these official witnesses is almost obligatory.[6]

[1] i.e., considered primarily with reference to the moral character of the witness ; cf., pp. 293–9.

[2] This appears to be swearing by delegation, but it is uncertain what is meant. No further reference is made in the *Mukhtaṣar* to such an official. According to Seignette's translation (rule 1419) this official appears to be the Ḳâḍi's substitute in the matter of the administration of oaths, corresponding to our Clerk of the Court.

[3] *'Ulamâ'*, sing. *'Âlim*, a title more particularly given to a professor of jurisprudence. (Lane, I. p. 149.)

[4] *Mufti*, the officer who expounds the Law. He assists the Ḳâḍi and supplies him with *fatâwa*, or decisions. (Hughes, p. 367.)

[5] Seignette (rule 1421) renders the sentence : The Ḳâḍi must in all cases be assisted by official witnesses.

[6] Thus the Court officials mentioned by Khalîl are :—

(*a*) The Ḳâḍi's private investigator (pp. 276, 279).
(*b*) Two official Court witnesses, whose memory takes the place of our Court records (p. 279).
(*c*) The certifying or accrediting witnesses who must be honourable men well known to the Ḳâḍi (p. 276).
(*d*) The Scribe (p. 279).
(*e*) Assessors (p. 279). These may also be the official witnesses.
(*f*) Interpreters, bailiffs, ushers, messengers (pp. 276, 278, 279).

Sub-section 2. Of words and acts blamable or not allowed in the Ḳâḍi himself.

The Ḳâḍi will not indicate or give his opinion as to the Law relative to the matter under consideration; he will neither buy nor sell in Court either himself or through agents; some jurists have even laid down that a Ḳâḍi should never make any important purchase or sale, in no matter what place; he will neither lend nor borrow nor arrange any commercial undertaking, for commercial operations undertaken by public functionaries are a bad example and ruin the subjects.

A Ḳâḍi is formally forbidden to receive presents in any shape or form.[1]

A Ḳâḍi should not sit as judge when preoccupied or suffering, nor when feeling ill or hungry, nor after having over eaten.

Sub-section 3. Of false witnesses and of those who, in Court, inveigh against the other side.

A person found guilty of having, of his own accord, given evidence concerning a fact of which he was ignorant, even if his evidence was indeed the truth, must be sentenced to the correctional punishment laid down by Law.[2] The sentence should be publicly carried out and the crime made known; the false witness will be taken through the markets and the most frequented places. But neither his head nor his beard will be shaved as a punishment nor will he be daubed with any colouring material. A record will be made of an act of perjury.

Will be treated as a misdemeanour and punished accordingly any person who slanders in Court either the other side or a witness.[3] But for a person to say merely that a witness's evidence against him is false, or to tell the other side that they are in error, does not amount to a misdemeanour.

Section VII

Of the Duties of a Ḳâḍi with respect to:—

(*a*) The Order in which Causes should be Heard;
(*b*) The Control of Arguments;
(*c*) The Value of Allegations;
(*d*) The Reconciliation of Parties.

Sub-section 1. Of the impartiality of the Ḳâḍi.

[1]. The subject of bribery, Ar. *rishwah*, is not mentioned in the Korân. Cf. rule 359, p. 173.

[2] 'Correctional punishment (*tazîr*) laid down by the Law,' cannot be the right rendering; for *tazîr* punishment is at the discretion of the Ḳâḍi. Only the punishment for a false accusation of adultery (*Ḳadhf*) is *ḥadd* or defined by the Law. Cf., rule 1628, p. 304.

[3] Or is contemptuous towards the Ḳâḍi. (*Tuḥfat*, rule 48.); cf., also p. 276. The punishment would usually be a few strokes with a lash, the number varying with the rank of the accused and that of the slandered witness. (*Tuḥfat*, note 28.) But in the case of a man of standing he should usually be pardoned if he forgets himself for a moment. (*Tuḥfat*, rule 49.)

A Ḳâḍi should preserve the most absolute impartiality as between the contending parties, and this should be the case even in suits between a Muhammadan and an Unbeliever.

Sub-section 2. Of the circumstances governing priority in the hearing of causes.

The Court will give priority of hearing to travellers and others whose business obliges them to hurry.

Sub-section 3.[1] Of informations that may or may not be received.

Every information or claim and all causes must be founded upon a definite fact, affirmed [2] as true.

Sub-section 4. Of the order in which the parties shall be heard. Of prior relations between the parties with respect to the defendant's oath.

After the plaintiff [3] has stated his case and the circumstances connected with it, the Ḳâḍi orders the defendant[3] to make answer, to con-

[1] With this sub-section may be said to begin the rules of procedure. As these and the rules of evidence treated of in the next chapter are so intimately mixed up, no clear idea of the subject will be gained until the two chapters have together been studied.

At the outset it may be well to call attention to the fact that public prosecution is unknown to Muhammadan Law ; all suits civil or criminal are private, at any rate in theory.

Again it is necessary to distinguish clearly between mere statements or allegations ; evidence of witnesses (not on oath) ; and statements or declarations on oath. Each has its own function in procedure.

The reader is again reminded (cf., p. iii.) that it is impossible to translate Muhammadan Law into English legal terminology. Care must therefore be taken not to give too literal a legal interpretation to terms that are of necessity employed.

[2] By 'affirmed' is not meant 'a solemn declaration without oath.' The information is considered as true until the contrary is proved, if contractual relations have been established. Cf., Seignette, rules 1441, 1442.

[3] To elucidate this sub-section it will be as well to give the definitions of plaintiff and defendant (*Tuḥfat*, rules 20 and 21) and to study the presumption of law (*juris*, not *juris et de jure*) contained therein.

A plaintiff is he in favour of whom the normal state of things entails no presumption. The defendant, on the contrary, is he whose pleadings are the outcome of presumptions resulting from the normal state of things.

For 'the normal state of things,' two words are used in the text :—*aṣl* and *ʿurf*.

The word *aṣl* is applied in personal matters and by it is meant that *ordinary* state of relations between any two persons taken at random, between whom, as a general rule, there exists no obligation. If then one party pleads that something has occurred derogatory to this normal state, as he who pleads that he is a creditor, he has against him the presumption resulting from *aṣl* ; he will be the plaintiff and will have to bring forward proof. This proof of the existence of an obligation once adduced, if the other party pleads a cause of extinction, the latter will have to bring forward proof in support : the application of the rule, *reus in exceptione actor est*. If, for example, I have brought forward evidence in support of a loan made by me to you and you assert that the loan has been paid back, the burden of proof falls on you, since, once the existence of the loan has been proved by witnesses, the *aṣl* is the non-return of the loan.

The word *ʿurf* contains an analogous idea but applies to chattels. Thus

fess or deny. The plaintiff's statement [1] of the case will not necessarily be accepted. For instance, in the matter of a deposit, the word of the defendant stating that he had duly returned the deposit will be accepted by the Court,[2] for the Law looks upon the bailee as a trustworthy man, who, moreover, had received the deposit without witnesses having been called to witness the fact. Again, in the matter of an individual claimed as a slave, his denial will be accepted, for the primitive state of man is to be free, and slavery is but an incident or result of, for example, a raid or a war in which Unbelievers have been taken by Muhammadans. As mentioned, the denial of an individual claimed as a slave will be accepted unless there is proof forthcoming that he was once in the possession of the plaintiff.

When in the absence of proof brought forward by the plantiff, the defendant denies the former's claim, the plantiff should begin by establishing the fact[3] that he has had, if only on one single occasion, business relations with the defendant.[4] He must do this in order to establish the origin of the matter in dispute, and be in a position to exact an oath[5] from the defendant. There is, however, no need to do this[6] when the defendant is an artisan from whom the plaintiff claims something that concerns his trade or industry; nor yet in the case of one accused of a crime, such as theft; nor again in the case of a stranger, who has been lodged, whether he be plaintiff or defendant;

A and B both plead that a certain chattel belongs to him; if one of them alone is in possession, he will be the defendant and the other the plaintiff, for he will have *'urf* against him, that is, the presumption resulting from the fact that ordinarily possession and ownership go together. If A and B both are in possession of the chattel, or if neither of them is in possession, the Court will have to determine, from what is most reasonable and in conformity with the normal state of things, which of the two parties is to be cited as defendant. Thus, if a man and wife both lay claim to a mirror, it is more reasonable to suppose that the mirror belongs to the wife and thus she becomes defendant and the husband plaintiff, for he has against him the presumption resulting from *'urf*. (*Tuḥfat*, note 10; cf., *Risâlâh*, note 184.) In this case, though the woman may bring the suit and be the plaintiff, still the burden of the proof will not be on her but on the husband (the *mudda'i*).

[1] i.e. without witnesses.

[2] Without oath if no contractual relations between the parties have been established; but with the clearing oath (see p. 302, note 9) if such relations have been established. 'The modern practice is in favour of administering the oath without inquiry as to business relations or grounds of suspicion.' (*Risâlah*, note 185.)

[3] By the evidence of a witness; cf., the maxim—*onus probandi actori incumbit.*

[4] For case in which defendant denies all contractual relations and then plaintiff produces proof of such relations, see sub-section 9, p. 285.

[5] 'Proof is demanded from the claimant on account of the weakness of his side; an oath is demanded from the defendant on account of the strength of his side, as having the benefit of the main principle which is in favour of non-liability.' (*Risâlah*, note 184.)

This oath is referred to as the *proffered* oath, proffered to the party in favour of whom there lies the presumption *aṣl* or *'urf*; see p. 302, note 9.

[6] i.e., to prove contractual relations.

nor in the case of a thing that can still be touched and seen; nor in the case of a deposit which could reasonably have been placed in the care of a person such as the one from whom the depositor is claiming; nor in the case of a sick traveller, for example, who claims a thing confided to the care of one of his fellow travellers; nor in the case of an action brought by a person who claims to have bought an article at such and such a price, whilst the seller argues that the sale was made at a different price. In all these cases the plaintiff can begin by requiring the defendant to support his negation of the former's claim on oath.[1]

Sub-section 5. Procedure with respect to avowals, denials and oath.

In those cases where no defence is made, the plaintiff will take care to see that the fact is recorded [2] so as to forestall any ulterior denials that the defendant might make; if the plaintiff does not think of taking this precaution, it is the judge's duty to warn him. The reason for this is to cut short all further arguments.[3] If, on the other hand, the defendant makes answer to the charge or claim, the Ḳâḍi then asks the plaintiff whether he is bringing forward any proof. When the plaintiff answers yes, the plaintiff's witnesses are brought forward and presented to the Ḳâḍi, who then asks the same question of the defendant. If then the defendant brings forward one *authoritative* [4] witness, those of the plaintiff are not heard; but, should the

[1] But if plaintiff 'pretends to identify the article claimed by him, specifying its quantity, quality, etc., under such circumstances he must, even when the defendant evades the oath, confirm his pretensions by swearing himself,' i.e., taking the suppletory oath, vide p. 302.

'But if on the other hand he rests his claims on mere grounds of suspicion, (e.g. declaring that he suspects a man of having stolen his property) then the defendant is held to be convicted at once by his refusal to swear, and no oath will be exacted from the plaintiff.' (*Risâlah*, note 186.)

[2] In any case the party in whose favour judgment is given can demand a written judgment which must be certified by two witnesses; but see also p. 290.

[3] In this case the Ḳâḍi declares in his judgment that the losing party is debarred from bringing forward any fresh arguments in the future and cannot seek to go back on the judgment. (*Tuḥfat*, rule 98). The hypothesis here in view is as follows:—one of the parties has obtained an adjournment in order to produce his witnesses. The term of this adjournment expires before the evidence is produced. The Ḳâḍi declares the party debarred from the right of claiming to be heard in the future against the judgment which he is about to pronounce and which is definitive. This declaration of forfeiture, known under the name of *ta'jîz* is most important. If not made, fresh evidence might be produced, even after judgment has been pronounced, and this judgment would be null and void. (*Tuḥfat*, note 56). Cf., Morand, p. 346, note 1. But for cases in which such a declaration cannot be granted see p. 285, note 2.

[4] The authoritative or unexceptional witness whose evidence, not on oath, is complete judicial proof in itself. (*Tuḥfat*, rule 138). Such a witness might be the head of a *zâwiya*; but the Law evidently considers the virtues required to constitute an *unexceptional* witness to be so rare that he is scarcely mentioned. The *Tuḥfat* indeed lays down (rule 196) that if the evidence of an *authoritative* witness is contradicted by that of two *honourable* witnesses, the Ḳâḍi either pronounces judgment in favour of the party producing the *authoritative* witness

defendant's witness not be an *authoritative* one, the case is given in favour of the plaintiff.[1] In the case where the plantiff produces no proof and the defendant denies the former's allegation on oath,[2] no evidence can thereafter be accepted from the plaintiff.[3]

Every civil case can be commenced by causing the plaintiff first to produce his proof[4]; the names, parentage and addresses of the witnesses are then read over to the defendant; the defendant then states his side of the case and produces his witnesses; if he cannot do so, the Ḳâḍi gives the case against him.[5] After having heard all the witnesses the Ḳâḍi should not pronounce judgment unless both parties are present in Court, or unless one or both are at no greater distance than a two days' march.

Should the defendant say to the plaintiff, 'You have already proffered me the oath in this same matter,' and should the plaintiff deny the allegation, the defendant has the right to require the plaintiff to make solemn oath in support of his assertion.

The defendant has also the right, after the plaintiff's witnesses have been heard, to require the latter to declare on oath whether he was aware of any acts of immorality or irregular conduct on the part of his witnesses. This rule of procedure is due to Al-Mâziri. If the plaintiff swears that he had no knowledge of immoral acts committed at any time by his witnesses, the hearing of the case is proceeded with; if he refuses to swear, the oath is taken by the defendant and judgment at once pronounced in his favour.

Sub-section 6. Of the right to answer in civil causes. Of those questio ıs and informations to which the Ḳâḍi should take no heed.

on his taking the oath, thus following Aṣbagh's opinion; or in favour of the party producing the two *honourable* witnesses, in accordance with Muṭarrif's opinion, which is the more usually followed. For the status and virtues necessary in ordinary witnesses, see p. 293 et sq.

[1] If the defendant has no witnesses, it is doubtful whether it is absolutely necessary for the Ḳâḍi even to hear the evidence of the two witnesses produced by plaintiff. Should the defendant produce two witnesses of exactly equal moral witnessing capacity to those of plaintiff, judgment will be given in accordance with rules on p. 305; see also p. 286, note 6.

[2] See p. 282, note 5. The oath is always administered by the Ḳâḍi who frames the statement that is to be sworn to in accordance with the wishes of the party at whose instance it is administered. (*Tuḥfat*, rule 207.) In this case the defendant only makes oath at the instance of the plaintiff and not otherwise. Cf., *Tuḥfat*, note 13.

[3] But 'when, after the defendant has sworn, the plaintiff discovers some evidence of which he was not aware before, judgment may be given thereon in his favour. But if he knew beforehand of the existence of the evidence, according to one view, it will be inadmissible: according to another it may be accepted.' (*Risâlah*, rules 191, 192.) In any case, the plaintiff, in these exceptional circumstances, must state on oath the reasons that prevented him bringing forward the evidence in the first instance. (Perron, V. p. 155.)

[4] i.e., his witnesses.

[5] This is repeating what has been said above.

It is the Ḳâḍi's duty always to ask the defendant or plaintiff, as the case may be, whether he can answer to the allegations or bring rebutting evidence, and this question is to be put as many times as may be necessary.[1] In the event of this rule not having been complied with, the Ḳâḍi's judgment is null and void.

Sub-section 7. Of adjournments.

The Ḳâḍi will grant a reasonable adjournment to the party against whom judgment is to be entered, if he promises to bring forward proof in his favour.[2] After the lapse of a suitable time, the Ḳâḍi pronounces judgment, no further evidence having been advanced. Judgment may also be pronounced under reserve, that is, subject to the consideration of further proof.

Sub-section 8. Of a refusal to answer to a charge. Explanations which a defendant may require of a plaintiff.

Should a defendant refuse to answer to a charge he can be imprisoned or flogged in order to make him answer. If he still persists, judgment will be given against him without the plaintiff being called upon to make oath.[3] The defendant may require of the plaintiff an explanation as to the origin of the charge preferred against him.

Sub-section 9. Of causes relating to commercial transactions.

When a defendant denies the whole of the fact alleged against him, saying, 'There has never been any transaction whatever between us,' it is for the plaintiff to produce his proofs. If these are accepted, the defendant can advance no further answer to the charge, for since he has denied the very origin of the fact of the charge, he cannot be allowed to bring forward any proof with reference to the claim contained within the charge.

[1] This question, 'Have you anything further to say?' known as the *iadar*, must be put in the presence of the two official Court witnesses and is absolutely necessary. Cf., *Tuḥfat*, rules 80–84, notes 42–26.

But the Kâḍi is dispensed from this formality whenever the legal witnessing capacity of the witnesses is such that they cannot be challenged. Thus may not be challenged: the evidence of an official witness of the Court, of a witness delegated by the Court to make enquiries, of the Court's secret investigator, of the *authoritative* witness, of those witnesses who might prove dangerous to the challenger. (Seignette, rule 1455.) By rebutting evidence is meant evidence to discredit the other side's witnesses in their moral characters.

[2] If the defendant then produces witnesses, the Ḳâḍi is bound to inform the plaintiff, and the latter, unless he can make answer and produce further witnesses, will have judgment definitely entered against him, except in case of homicide, of *ḥabs*, freedom, filiation and divorce. (Seignette, rule 1457.) In such cases the plaintiff (but not the defendant) can at any time bring forward fresh proof with the effect, may be, of getting judgment reversed in his favour. Thus if a woman alleges that she has been divorced by her husband, but cannot at the time bring forward witnesses, the Ḳâḍi cannot give defendant a *taʿjîz* declaration (see p. 283, note 3) and the woman is never debarred from bringing forward proof of her alleged repudiation.

[3] Cf., *Tuḥfat*, rules 54–55.

Sub-section 10. Of the taking of the oath on trials where two witnesses are required to constitute legal proof.

In all cases of enfranchisement, of repudiation or of marriage, where to constitute proof two male honourable witnesses, or one male and two female, are required,[1] the oath cannot be proffered to the defendant unless one witness has given evidence ; [2] after the witness has given evidence the plaintiff can proffer the oath,[3] but the defendant cannot proffer it back to the plaintiff.[4]

Sub-section 11. Of reconciliation and friendly agreement.[5]

Where the parties are honourable persons, enjoying a certain amount of consideration, or are well known on account of their high character, or who give themselves up to the study of religion, or are united by close family ties, it will be the judge's duty to recommend that they settle their differences out of Court.[6]

Section VIII

Of those in favour of whom a Ḳâḍi may not pronounce Judgment

The Ḳâḍi may not judge in favour of those for whom he could not be witness, such as his father, son or wife. The sentiment of relationship might influence his mind.

Section IX

Of the Revision and Quashing of Judgments. Of the Motives and practical Consequences of Quashing. Of those Judgments which can only be quashed by the Judge who has pronounced them

Sub-section 1. Of the revision and integral or partial quashing of

[1] Vide rule 1562, p. 299.

[2] That is to say that the oath cannot be proffered on the mere allegation of the plaintiff and on his demand.

[3] Defendant's oath would annul the evidence of plaintiff's one witness and the case would be dismissed. If the plaintiff produces two witnesses and the defendant only one, then judgment is given for plaintiff. If each side produces two witnesses, see rules 1659 et sq, p. 305 and note 6 *infra*.

[4] The *proffered* oath can never be proffered back by defendant to the plaintiff against whom presumption lies. On the other hand the *clearing* oath, taken where property of any kind is concerned, can be proffered back by him who denies the allegation, cf., *Tuḥfat*, rules 214 and 217.

[5] The Korân, Sura vi., says :—The friendly settlement of disputes is a great merit. But see also Section xi. p. 289.

[6] Another case, not mentioned in the *Mukhtaṣar*, in which reconciliation should be attempted is when the Ḳâḍi either (*a*) cannot decide what is in law the solution of the matter before him, or (*b*) cannot decide because of the contradictory evidence given by witnesses on either side and of equal legal witnessing capacity. In these cases the Ḳâḍi should first make reference to another wiser and more intelligent than himself for directions as to the exact texts to consult, but if he remains in doubt, he should attempt to conciliate the parties. (*Tuḥfat*, rule 38, note 23.)

judgments or judicial decisions. Of the circumstances that govern the quashing. Of those modifications which some judgments must undergo on account of the incapacity of the witnesses.

A newly appointed Ḳâḍi may quash his predecessor's judgments if they appear to be vitiated by reason of some intentional injustice. As a general rule, when the last judge was a just and enlightened man, his successor will not quash his judgments, unless indeed they be contrary to the principles contained in the Korân and the *Sunnah*.[1]

Sub-section 2. Of those judgments that can only be revoked by the judge who has pronounced them.

The Ḳâḍi has alone the right to revoke his own judgments in the three following cases :—

(1) when he recognizes that another decision would have been more equitable, that is if, for example, he had followed the opinion of Ibn al-Ḳâsim [2] and that afterwards that of Saḥnûn appeared to him to be surer and preferable ;

(2) when he recognizes that he had deviated from his first train of thought ;

(3) when he recognizes that he had deviated from the principles of the School adopted by him.

In the second case he can only revoke his own judgment if, inspired by the opinion of a certain eminent jurist, he had, in fact, based his judgment on that of another.[3]

Sub-section 3. Of the irrevocability of a judicial decision that is based upon an intention of the Law.[4]

[1] Khalîl here proceeds to give many highly technical cases in which it might be right to quash a sentence, not because of any intentional injustice but on account of wrong interpretations of the Law, as also in those cases where the Mâliki School is not in accord with another of the Orthodox Schools.

[2] Author of *al-Maksab al-Ma'mûd* and of the *Mudawwanah* ; he died in A.D. 1190.

[3] For another method of getting his judgment reversed, see rule 1609, p. 303.

[4] Though the question involved in this sub-section is a most important one—the authority of the *res judicata*—still both Perron's and Seignette's translations are too vague and ambiguous to enable one to come to any conclusion. M. Morand in his *Études de Droit Musulman Algérien*, has deeply studied the subject, and a summary of ch. viii. of his work is here given.

It is generally affirmed that the authority of the *res judicata* is not admitted in Muhammadan Law and there is much to support the assertion. According to Zeys, our maxim, *res judicata pro veritate habetur* is replaced in Muhammadan Law by the authority of the well judged judgment.

Let us examine the subject. By the authority of the *res judicata* we mean that a judgment is conclusive until reversed. It can only be reversed by :—(*a*) a superior Court ; (*b*) the same Court ; or (*c*) another Court of the same degree of jurisdiction as the one that originally pronounced the judgment.

(*a*) We know that a judgment cannot be reviewed by a higher Court, for none such exists ; a Ḳâḍi finally adjudicates on all matters brought before him (unless

Sub-section 4. Of the form of expression in giving judgment, with respect to its revocableness.

SECTION X

OF THE OBLIGATION TO CONSULT THE TEXT OF THE LAW EACH TIME THAT THE SAME CASE PRESENTS ITSELF

On each fresh question arising for the Court's decision, the Ḳâḍi will look up the precise intentions and the just applications of the Law with respect to the matter under consideration ; for a judgment is always a special, isolated, decision, one of detail, never a general one embracing several cases.[1]

specially restricted by the sovereign) and there is no appellate jurisdiction. (Section II, p. 277.)

(*b*) A Ḳâḍi can only review his own judgments under certain exceptional circumstances (Section IX, sub-section 2, p. 287,) and his successor in the same Court can only review his predecessor's judgments under the circumstances mentioned in sub-section 1 of the same Section.

(*c*) As to another Court reviewing the judgment at the instance of the party who has had judgment delivered against him. The meaning of sub-section 3, now under consideration, is that a judgment is conclusive with reference to the text of Law on which it relies. Thus no other Court can re-hear the case, for the litigation no longer exists. But there is another rule in Section XIV (p. 289) which presents no sort of ambiguity : 'every judgment that is certified to by the two official Court witnesses is executory, no matter whether the Ḳâḍi himself denies having given the judgment or has forgotten it ; and again: a Ḳâḍi within his own (territorial) jurisdiction may refer to the Ḳâḍi of another jurisdiction, by means of the two official Court witnesses, in order that the latter may execute the judgment pronounced by the referring Ḳâḍi, or for the purpose of finishing the hearing of a case begun in the referring Ḳâḍi's Court. . . The Ḳâḍi thus instructed is bound to execute the judgment. . .

Thus we may well infer from these rules that no fresh judgment by another Court can be pronounced on any case that has once been judicially decided ; unless indeed both parties to the litigation conceal the fact of a previous judgment, or the judge himself exceeds his powers.

[1] An Alḳali in Hausaland, when questioned as to the propriety of one of his decisions, usually shelters himself behind the answer: So I found it in the book. The Alḳali need by no means be quibbling ; he is giving a full and sufficient answer. The general idea underlying Muslim procedure is well shown by Russell and Suhrawardy, (*Risâlah*, p. 98.) 'Perhaps we can best give a general idea of the nature of Muslim procedure by describing it as a self-acting system ; that is to say, it aims at being automatic, in the sense of leaving as little as possible uncertain or subject merely to the discretion of the judge. For this purpose it goes into the most minute details : specifying exactly what amount of evidence is requisite in each particular case ; describing how divergent evidence is to be reconciled ; directing which side is to be preferred where the testimony is conflicting ; fixing the initial presumptions arising from the nature of the claim, and a multiplicity of further presumptions connected with the details of evidence. All this network of rules and presumptions is binding on the judge : it forms at once a check upon the arbitrary exercise of individual judgment, and a ground for disclaiming personal responsibility and escaping odium : it is not he, the judge, who decides the case ; the rules of Law provide for every detail, and it is merely his duty to refer to those rules. Such, so far as it can be expressed in a few words, is the principle of the system.'

Section XI

Of those Circumstances in which a Reconciliation should not be brought about

The Ḳâḍi is not allowed to urge reconciliation in those cases where he sees from the proofs or avowals that one of the parties is entirely in the right. (Exception only is made in those cases mentioned on p. 286.)

Generally speaking, there is in a reconciliation that which humiliates or brings into discredit; at times also a reconciliation is injurious to certain rights.

Section XII

Of Evidence as the Foundation of a Judgment

In all judicial matters, the Ḳâḍi must endeavour to obtain evidence and consequently to be guided, in the first place, by what he knows of the uprightness, or otherwise, of the witnesses,[1] rather than on what he has learnt in Court as to the matter under consideration.[2]

Section XIII

Of the Disavowal of Confessions

Where an individual has been condemned by reason of his confession in Court, any subsequent disavowal of his confession is of no avail, and the sentence remains. It is evidently here supposed that the Ḳâḍi had pronounced sentence without calling upon two witnesses to take notice of the original confession, as the Law prescribes; but, even if he had done so, since the confession was made in Court, the judgment stands. If the party goes back upon his confession before judgment is pronounced, the Ḳâḍi should come to no decision, for in this case he would be influenced by what he himself knows.[3]

Section XIV[4]

Of the Execution of Judgments

1489.[5] Every judgment that is certified to by the two official

[1] Practically the only latitude—and that a large one—that the Law allows to a Ḳâḍi is to decide on the moral worth of the witnesses, either from what he knows of them personally or through certifying witnesses personally known to him. In arriving at a decision, Mâlik insists that the Ḳâḍi must be guided by evidence and confessions only, or, in exceptional cases, by the oath of one of the parties. He must even admit the evidence of an *honourable* witness when he knows it not to be true (*Tuḥfat*, rules 42–45), and must not accept the evidence of a witness who is not *honourable*, even when he knows it to be true. As Morand says, p. 332: It is not for the Ḳâḍi to assure the triumph of truth or justice. See also p. 273, note 1; p. 274, note 5.

[2] In the case of what has actually occurred in Court in the Ḳâḍi's presence, he can decide without hearing evidence; and this is the opinion of Saḥnûn now universally admitted. Cf., p. 277, note 6.

[3] And this would be contrary to the preceding rule. (Section XII.)

[4] This Section and the next are translated from Seignette.

[5] Rule 1489 is placed by Perron at the end of the preceding Section, but this is evidently an error.

Court witnesses[1] is executory, even if the judge who pronounced it denies it or has forgotten it.

1490. A Ḳâḍi, acting within his own jurisdiction, may verbally assign to another Ḳâḍi in another jurisdiction the execution of a judgment or the remainder of a hearing in any cause begun before the assigning Ḳâḍi. This verbal assignment of the duty of executing a judgment or finishing the hearing of a cause is carried out through the instrumentality of the two official Court witnesses.

1491. Should there be any contradiction between the written word of the assigning Ḳâḍi and the evidence of the two official Court witnesses, the Ḳâḍi to whom the duty has been assigned will accept in preference the evidence of the witnesses.

1492. The written word of the assigning Ḳâḍi should be closed and sealed, but by itself it has no convincing force.

1493. It is remitted to the Ḳâḍi who has been assigned and certified to as authentic by the two official Court witnesses. It may further be placed in the hands of another Ḳâḍi than the one to whom it was originally addressed.

1494. The document acquires convincing force from the moment that the two official Court witnesses testify before the assigning Ḳâḍi that it is the judgment of the assigning Ḳâḍi and in his own handwriting.

1495. The same applies to an acknowledgment under private seal and placed in the hands of two witnesses.

1496. The assigning Ḳâḍi must clearly designate the names, professions and titles of the parties between whom there is litigation.

1497. The Ḳâḍi who has been assigned, or in the event of his having been changed, then his successor, will see that the judgment is duly executed, even if it be a sentence ; or will continue the hearing of the cause, having regard to the facts set forth by the assigning Ḳâḍi. These things he will always do if the assigning Ḳâḍi is the Ḳâḍi at a provincial capital[2] ; in the case of another Ḳâḍi having assigned him, he need only carry out the duties imposed on him if he considers that the assigning Ḳâḍi had not the required capacity and knowledge of Law.

1498. The Ḳâḍi who has been assigned will not carry out his instructions if there is any confusion in the names of the persons cited.

Section XV

Of Judgments by Default.

1500. An action in which the defendant has been cited to appear

[1] For the *official Court witness* see Section VI., p. 279.
[2] Khalîl here refers to such Ḳâḍi as those of Cairo and Mecca.

is proceeded with to judgment even if he be not present, though living at no great distance.[1]

1502. If the defendant is about a distance of a ten days' march and the roads are safe, or of two days' if the roads are not safe,[2] the action will proceed[3] and the plaintiff will be allowed to take the oath,[4] unless the action concerns real property.

1503. If the chattel under litigation cannot be produced in Court it may be appraised by description, as in the case of a sum of money.

1504. If the defendant is within such a distance of the Court that he can come and return within one day, the Ḳâḍi can constrain him to appear, or can send him a written or verbal summons.

1505. If he is at a greater distance, say sixty miles,[2] the plaintiff must first produce a witness.[5]

1506. A Ḳâḍi cannot take the place of a woman's *walî*[6] in order to give her in marriage if she is domiciled outside his jurisdiction.

1507. In a matter of real property, it is undecided whether an action must be brought in the Court of the district wherein resides the defendant, as is generally done, or in the Court of the district wherein is situated the landed property, as the *Mudawwanah* infers.

1508. Jurisprudence is undecided as to whether an agent may begin an action on behalf of his principal when he has not been empowered by the latter to do so.[7]

[1] S.-s. 8, p. 285 refers to the defendant refusing to plead.

[2] This is a case in which a Ḳâḍi may commission a man of standing in the defendant's district to act for him, either to constrain the defendant to appear or to settle the case himself. (*Tuḥfat*, rules 33, 34) ; cf., p. 276, note 7.

[3] Not necessarily to a definitive judgment ; an interim judgment may be entered.

[4] Plaintiff swears that his pleadings are true. This oath might be called an executory oath.

[5] Before the defendant need appear.

[6] For the functions of a *walî* see p. 92 et sq.

[7] The agent can undoubtedly bring an action :—

(*a*) if he has a personal interest in the goods of his principal ;
(*b*) if he has hired goods from his principal ;
(*c*) or has borrowed goods ;
(*d*) if he has received goods in pawn from his principal ;
(*e*) or if his guaranty is concerned. (Perron, V. p. 191.)

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CHAPTER XXXIX[1]

EVIDENCE[2] (*SHAHÂDAH*)

SECTION I

OF THE WITNESS

Sub-section 1. Of the legal capacity of a witness.[3]

1509. TO give lawful evidence[4] the witness must be a free man, a Muhammadan, sane, of age and of pure morals. A

[1] Translated from Seignette.

[2] Morand (pp. 314–333) thus disengages the three fundamental ideas underlying the rules of evidence :

(*a*) Proof by verbal testimony is pre-eminently evidence ; it is receivable in all cases, whatever their nature or their importance. Putting confession on one side, verbal testimony is the only direct mode of proof which the Law admits as 'complete judicial evidence.'

(*b*) The Law frequently requires the taking of the oath, even in those matters where modern European law no longer requires it.

(*c*) The Law itself determines the conditions under which p oof can be and must be considered as complete ; to the judge in this matter is left but the slightest possible power of appreciation (i.e., the judge is not allowed to weigh the evidence).

See also *Risâlah*, appendix A, p. 98 : Abdur Rahim, p. 374 et sq. : Hughes, p. 110 et sq.

[3] The words 'eligible to give evidence' do not quite render the Arabic expression *ʿadl* [a]. This word, in its primitive sense, signifies justice, equity, he who has the sentiment and love of justice ; hence, in the language of the Law, it means :—wishing to do right in justice and equity, only wishing to testify in favour of truth ; he who is a just man, the unexceptional man [b] because his sincerity cannot be doubted.

The Kâḍi receives his commission directly from the sovereign. If he has received his commission on payment or by reprehensible means, such as making presents, he must be dismissed [c] and his judgments shall stand cancelled, even were they just in law and equity.

There can only be one Ḳâḍi in a given district ; he is thus the dispenser of justice in all religious and civil questions of which the Law takes cognizance.

The *ʿudûl* are also assessors or councillors. The *mufti* is a consulting lawyer ; he neither decides nor judges but he may have the functions of a justice of the peace or of arbitrator. In administrative measures where questions of public morality are concerned, *mufti* should be called upon to give their advice or decision. A *mufti* is he who gives *fatâwa* or decisions. (Perron, V. p. 530.)

[4] Ibn-ʿArfa's definition of evidence is as follows :—To give evidence is to witness to a fact that has resulted in legal process, with a view to judgment being pronounced. (Seignette, p. 463.) According to Muhammadan jurists, false evidence is a contradiction in terms. (Abdur Rahim, p. 375.)

[a] *ʿAdl*, pl *ʿudûl* ; Hausa, *adulchi* ; the word occurs twelve times in the Korân. *Al-ʿAdl* is one of the ninety-nine special names of God, and signifies 'The Just.'

[b] Cf., *Risâlah*, rules 199 and 210.

[c] See p. 274, note 6.

heretic, whether a Khâriji or a Ḳadari [1] cannot give lawful evidence

1510. No person will be permitted to give evidence who is known as a criminal, or who is known habitually to perjure his word, or one who habitually commits vile and venial sins, or one who is given up to dissipation and gambling.[2]

1511. A witness should possess a steady and virile character : one disdainful of vulgar distractions ; even he who is continually playing chess should not be allowed as a witness.[3] [4]

Sub-section 2. Of relative incapacity.

1512. The blind witness can only testify to what he has heard and the deaf and dumb to what he has seen.

1514. A man may not give evidence in favour of a near relative.[5]

1515. Father and son are reckoned as but one single witness.[6]

[1] The Khâriji [a] signify those that have 'come out', from the meaning of the verbal root of the word. They have broken away from obedience and orthodoxy ; what we should call protestants. The Khâriji formed a sect which has since broken up into twenty secondary sects.

Originally there were seventy-two sects in Islâm. In the earliest days of Islâm the three most important sects were the Mu'tazila, the Khâriji and the Ismailians.

A tradition says :—My people are divided into seventy-three [b] sects who are all condemned to hell fire except those that follow me and my companions.

The Kadari [c] get their name from *ḳadar*, power, for they asserted that man had power over his own actions. They are also extreme Unitarians, for the better to constitute the unity of God they deprive Him of all attributes, even though they declare that God's justice is necessary. (Perron, V. p. 538.)

[2] i.e., men who are *fâsiḳ* (trangressors of religious obligations) as opposed to *'adl*. (Abdur Rahim, p. 377.)

[3] It will be seen that such rules as these and the following are necessary when it is remembered that verbal testimony derives its probative force from the high character of the witness and the independence which he must enjoy. Cf., *Risâlah*, p. 102.

[4] At this point, curiously enough, the *Minhâj* lays down the rules of music, poetry and dancing. Musical instruments that are likely to excite to drink are forbidden : such as, the guitar, lute, castagnettes and flute. On the other hand, to play on the pipe is lawful, though Nawawi, the author of the *Minhâj*, himself absolutely prohibits it. Again, songs not accompanied by a lawful instrument are forbidden. Dancing is allowable, so long as it is not effeminate. In poetry, there must be no satirical or indecent allusions, nor any to a woman specially designated. (*Minhâj*, III. p. 401.)

[5] Near relatives include father, grandfather ; mother, grandmother ; step-mother, stepfather ; stepfather's wife or her son or father ; wife : neither may a wife give evidence in favour of her husband's father or mother. (Perron, V. p. 197.) It is for the Ḳâḍi to judge whether the relationship is too close for the evidence to be free from suspicion. (*Tuḥfat*, note 69.) On the other hand in Shâfi'i Law a witness may lawfully testify against one of his ascendants or descendants. (*Minhâj*, III. p. 404.) Husband and wife may give evidence in favour of one another, also brother in favour of brother and friend in favour of a close friend. (Idem.) See also rule 1525, p. 296.

[6] This is Khalîl's rule, but the *Tuḥfat* (note 74.) has it otherwise.

[a] For further information on the sects of Islâm see Macdonald, p. 119 et sq. ; also Hughes, p. 567.

[b] The seventy-third sect is the Nâjiyah or 'Saved Ones,' which comprises all the Sunnis of the four orthodox Schools.

[c] 'Asserters of free-will.' (Hughes, p. 568.)

A son cannot give evidence in his father's Court ; nor can he be one of the official Court witnesses.

1516. The *unexceptional* witness [1] may be admitted to give evidence in favour of his brother [2] and even to certify to the character of a witness called by him. Further, the evidence of an *unexceptional* witness may be admitted in favour of his paid servant or his enfranchised slave ; also in favour of his friend or of his partner, except as to that which concerns the affairs of his and his partner's business. The *unexceptional* witness may add to or take away from his original declaration ; he may recall to memory after first having been in doubt ; he may certify to the character of a witness, even in capital cases if he is known to the Ḳâḍi and is not a stranger to the district.

Sub-section 3. Of witnesses to character.

1557. Witnesses to character are those that are called to testify to the irreproachable good character of a witness.[3]

1558. A witness to character must have long known the witness [4] to whose legal witnessing capacity he is about to testify. He cannot give hearsay evidence [5] as to character.

1559. If required to, it is obligatory on a man [6] to testify to the character of a witness who is personally known to him. It is also a man's duty to denounce a witness's character, if his not doing so would be prejudicial to justice.

1520.[7] Although witnesses may have certified as to character,

[1] For the *unexceptional* or *authoritative* witness, see p. 283, note 4, also p. 299, rule 1547. The evidence of such a witness is in itself, without oath, conclusive judicial proof. (*Tuḥfat*, rule 138.)

[2] Provided he does not live in his brother's house. (Perron, V. p. 199.)

[3] The office of a witness to character in no way resembles what we understand by the same in English Law. Generally speaking, Muhammadan Law divides witnesses into two classes ; those whose moral character is personally known to the Ḳâḍi and those who are not so known. In the first case, unless an objection is entered, they may give evidence without formality. In the second case, their evidence cannot, in principle, be accepted unless they are qualified or rendered apt to testify legally through the evidence of two witnesses as to their character. The words used by the witness to character are : *ʿadl riḍâ*, signifying that the witness is a just man whose testimony will be agreeable to God. Cf., *Tuḥfat*, notes 64–66.

The process of accrediting is known as *taʿdîl* and the converse process of discrediting as *tajrîḥ* (*Risâlah*, note 209). Khalîl does not lay down the rule that ' testimony as to character may not be called in the case of women ; nor may they be discredited.' (*Risâlah*, rule 209.)

The process of accrediting is not mentioned in the *Minhâj*.

[4] The capacity to bear evidence, conferred by the process of accrediting, holds good for some months, at most for a year. (*Tuḥfat*, note 68.)

[5] But he may give evidence based on such belief in his own mind as amounts to knowledge. Cf., rule 1528, p. 296.

[6] It is understood that these witnesses as to character are men of known rectitude of conduct. The Ḳâḍi keeps a list of such men.

[7] For the sake of reference to the Arabic text, the error in numbering the rules that occurs in Seignette's work is here reproduced.

still the Ḳâḍi should take secret measures to assure himself further as to the witness' good character.[1]

1521. To render a witness apt to testify lawfully, his good character must be accredited by at least two certifying witnesses.[2]

1522. It is not indispensable that these two accrediting witnesses should know the name of the witness to whose good character they testify, nor are they required to give reasons in support of their testimony.

1523. It is otherwise if their testimony is challenged. The testimony of the challenger will always carry more weight than that of the accreditor.[3]

1525. Unless there is manifest partiality a father may be admitted to give evidence in favour of one son against another. In the same way a son may be admitted to give evidence in favour of one of his ascendants against the other.

Sub-section 4. Of objections to a witness.

1526. Any witness may be objected to on account of bias towards the defendant or any of his ascendants.[4]

1527. Thus there is sufficient motive for an objection when a witness in Court says to the party against whom he has testified : 'Do you suspect my veracity?' 'do you take me for a fool?' But such words, if spoken out of Court, would not constitute a case for an objection.

1528. When testifying as to lack of means, a witness may base his evidence on the conviction he has gained through his intercourse with the party concerned and the knowledge he has of the privations endured by him.[5] On a similar conviction a witness may base his evidence, when he testifies as to the incompatibility of temper between two spouses.

1529. A witness may be objected to if his evidence is suspected of being influenced by passion or by the fact that a previous objection had been lodged against him. Again, he may be objected to if sus-

[1] In the case of a secret inquiry on behalf of the Ḳâḍi, only one declaration is necessary (*Tuḥfat*, note 65 ; rule 112).

[2] If the witness-in-chief is known by sight only to the Ḳâḍi, he need not be present in Court when his capacity to give evidence is testified to by the witness to character. But if he is not known at all to the Ḳâḍi, he must be present. (*Tuḥfat*, rule 110.)

[3] The commentators explain this rule by saying that those who challenge the character of a witness must know of something to his disadvantage which the accrediting witnesses did not know. (*Tuḥfat*, note 67.)

[4] Religious bias is not here included ; for where there is difference of religion, bias is general and not individual. A Muslim may testify against a non-Muslim unless the former is known to be the personal enemy of the latter ; but, generally speaking, a non-Muslim may not testify against a Muslim. (Perron, V. p. 206.)

[5] Direct testimony alone, generally speaking, has any probative value. (Abdur Rahim, p. 378.) Circumstantial evidence is only accepted if it is of a conclusive nature. (Idem, p. 381.)

pected of trying to bring down to his own level the party against whom he is giving evidence ; as in the case of a bastard testifying in a case of adultery, or of a witness who has been convicted of a crime testifying against a man accused of the same sort of crime for which the witness had once been convicted.

1530. A witness may be objected to on account of the eagerness and warmth he shows in getting his evidence accepted. For example, as when he takes it upon himself to denounce the opposite party in a civil or criminal suit, or when he offers to corroborate his own evidence by an oath, or when he gives evidence in a purely private case without having been subpœnaed.

1531. In cases where the public weal is concerned every one should as far as in him lies at once denounce infractions, if they persist. Such cases would be infractions of the law of enfranchisement, of *ḥabs*, of fosterage.[1] If, on the other hand, the infractions cease, a witness is not bound to denounce them : such would be cases of fornication.

1532. The zeal that is put to acquiring knowledge of a fact in order to give evidence, or the fact of hiding in order to overhear a confession, are not sufficient reasons to uphold an objection.

1534. A beggar's evidence may be objected to in a case where a considerable um of money is involved ; but not so if he only asks without begging [2] or only asks alms of persons of quality.[3]

1535. A witness may be objected to if he is suspected of getting profit from his evidence. Such a case would be where a witness gives evidence of fornication or wilful homicide against a relation from whom he would inherit, unless such relation was in indigent circumstances ; or where the effect of a witness' evidence would be to augment his, the debtor's, assets.[4]

1536. Two witnesses may lawfully give evidence in the same case in favour of one another.

1537. In a case of robbery with violence, members of the same caravan are allowed to give evidence in favour of one another.[5]

1540. The following witnesses may be objected to : the one who testifies against the legal witnessing capacity of a witness to an involuntary homicide where blood-money would be at the former's charge : the bankrupt debtor who gives evidence in favour of his creditor.

[1] In infractions of the laws of enfranchisement, *ḥabs* and fosterage, the Law supposes an element of permanence, and in the case of a man marrying his foster-sister it is God's law only that is outraged. Cf., Perron, V. pp. 212, 213.

[2] Perron translates : if he neither asks nor begs.

[3] But the alms must not be for himself, nor must there be any question of *zakât*. (Perron, V. p. 215.)

[4] For the creditor is an interested witness. Similarly, a debtor cannot give evidence in favour of his creditor for fear of collusion. (*Tuḥfat*, rule 119, note 73.)

[5] Even though there must be *enmity* between the robbed and the robbers.

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1541. For the same motive, the witness may be objected to who testifies as to a claim and declares that he has sold the object to the claimant.[1]

1542. If, before judgment is pronounced but after the evidence has been taken, one of the witnesses is denounced as an evil-liver, his evidence will not be admitted.

1543. Non-admittance of evidence will not be allowed retrospectively when the witness is denounced on suspicion of obtaining profit from the effect of his evidence, or on account of his fear of having to pay compensation, or on account of bias.

1544. A learned man can be objected to as a witness by another equally learned.[2]

1545. A witness accused of being in relation with tax-gatherers, or having eaten at their table, can be objected to.

1546. Any of the following may be objected to :—

(*a*) the witness who is suspected of being influenced by esprit-de-corps ;

(*b*) one who has been bribed ;[3]

(*c*) one who has given legal advice to the party on whose behalf he is giving evidence ;[4]

(*d*) one who has celebrated the day of the *Nau Rûz* ;[5]

(*e*) one who has put off paying what is due by him without valid excuse ;

(*f*) one who is in the habit of swearing that he will divorce his wife or manumit his slave ;

(*g*) one who has attended the Court three times running without a plausible motive ;

(*h*) one who habitually trades with foreigners ;

(*i*) one who lives in a house that he has usurped ;

(*f*) one who lives with a son who drinks wine ;

(*k*) or has cohabited with a woman during an unlawful period, or with a woman not lawfully allowed to him ;

[1] The inference being that if the witness did not say he had sold the object to the claimant the latter would be under the suspicion of claiming from the former the price of the object. (Perron, V. p. 222.) The explanation does not seem to make the rule any clearer.

[2] The Law here takes into account the well-known rivalry between men of science.

[3] To prevent injustice being done it is lawful to bribe, but not to receive the bribe. (Perron, V. p. 226.)

[4] That is, if the legal advice consisted of telling the witness what evidence he should give, provided the evidence was not the truth. (Idem.)

[5] The day of *Nau Rûz*, the Coptic New Year's Day. According to Perron, a man who joined in the celebration of the Coptic New Year's day by singing and dancing must have forgotten his self-respect and thus be incapable of giving evidence ; but it may also be that the *Nau Rûz* celebrations referred to in the text are those of the unorthodox Shiites, for with them it is a festival, but not so with orthodox Muhammadans of the Mâliki School.

(*l*) one who is distracted and looks about during prayer;

(*m*) one who has used building material on loan, or material which has come from out of a mosque;

(*n*) one who does not carry out his duties as to purifications, ablutions and *zakât*;

(*o*) one who trades in flutes and drums;

(*p*) or one who has proffered the oath to his own father.

1547. The foregoing reasons on which to base an objection may be brought forward in the case of an *ordinary* witness, but only those relating to bias or relationship can be adduced in the case of an *exceptional* witness.

Sub-section 5. Of witnesses who are minors.[1]

1550. As an exception to rule 1509 the evidence of a minor is admissible in the case of homicide or of wounding, but not that of a girl who is a minor.

1551. To admit the evidence of a minor it is necessary that his status should be that of a free man and there must be more than one such minor witness.

1552. They may be objected to on account of bias or near relationship.

1553. Their evidence must be absolutely corroborative the one of the other.

1554. Their evidence will not be admitted if a witness of age was present.

1555. Their evidence will never be admitted for or against a person who has reached his majority.

Section II

Of Judicial Proof

Sub-section 1. Proof by means of four witnesses.

1557. To establish conclusive judicial proof in cases of fornication [2] or sodomy, the evidence of four male witnesses is required and all these witnesses must have seen the act at one and the same time.[3]

Sub-section 2. Proof by means of two witnesses.

1562. In questions of personal status, etc., as distinguished from questions of property, two male witnesses are necessary.

Sub-section 3. Proof by means of one witness and the claimant's oath.

[1] 'With respect to charges of wounding, the testimony of minors may be accepted, provided it is offered before they disperse and before any adult person comes among them.' 'The Law is thus framed in view of the ease with which infantile evidence may be vitiated by suggestion. Wounding includes homicide.' (*Risâlah*, rule 212 and note.)

[2] Fornication includes adultery and incest.

[3] The tendency of this rule is to make it impossible ever to convict.

1563. In all questions relating to property, judicial proof is complete by the evidence of (*a*) one man and two women or (*b*) one man and the claimant's oath or (*c*) two women and the claimant's oath.

Sub-section 4. Proof by two female witnesses.

1564. In matters of which women alone are cognisant, e.g., childbirth, the evidence of two female witnesses is conclusive evidence.

1565. Such proof is sufficient in all cases of heredity or filiation without the claimant's oath.

Sub-section 5.

1566. In cases of theft, the evidence of one male witness together with the oath of the plaintiff is conclusive as regards the civil side of the case, but not as regards the criminal side.[1]

1567. The same rule applies when one slave is accused of having murdered another slave.[2]

Sub-section 6. Of where proof begins.

1568. A woman slave who is laid claim to may be remanded under arrest as soon as there is a beginning of proof or even a probability against her.

1569. In all other cases, a remand under arrest can only be granted after the evidence of one adult witness, or two not-yet-accredited-witnesses, has been heard.

1570. In the case of a chattel under dispute, it will be sold if it is of such a nature as to suffer deterioration, and the proceeds of the sale will be deposited in Court until such time as the two witnesses have been accredited.

1571. On the other hand, if only one ordinary witness has been produced and the possessor of the goods makes oath, he will be allowed to remain in possession until the case is finally disposed of.

Sub-section 7. Of written evidence.

1577. Written evidence will be admitted on proof of authenticity by the testimony of two male witnesses[3] without the claimant being called upon to make oath.

Sub-section 8. Of evidence as to identity.

1581. No one may give evidence against another whom he does not know, unless he be present in Court or unless the witness gives a sufficient description as to his identity.[4]

Sub-section 9. Evidence of common report.

1586. Evidence of common report will be accepted in support of long-continued possession; but the witnesses to this common report

[1] Cf., p. 340, note 7. [2] Cf., rule 1888, p. 320. [3] Cf., *Risâlah*, p. 101.
[4] Rules 1582–1585 concern veiled women.

must testify that they have this report from men worthy of belief or other certain source.

1589. To admit common report the following conditions must exist :—

(*a*) the fact to be proved dates from long ago ; (*b*) the absence of any contrary presumption ; (*c*) the claimant's oath ; (*d*) the plurality of witnesses.

1590. Common report may, however, be admitted, even though the fact to be proved did not occur a long time ago, in the following cases :— (*a*) as a means of discrediting a witness ; (*b*) as an accusation of irreligion or of prodigality ; (*c*) to prove a marriage or its dissolution, even by mutual consent ; (*d*) to prove conjugal cruelty ; (*e*) to prove a testamentary gift or one between the living ; (*f*) or the motherhood of a slave ; (*g*) or an accusation of brigandage (rules 2114–2125, pp. 343–4) ; (*h*) or the desertion of a slave ; (*i*) or the captivity of a relation ; (*j*) or the manumission of a slave ; (*k*) or a grave presumption of murder (rule 1853, p. 318).

Section III

Of the Giving of Evidence

Sub-section 1. Of the obligation.

1591. To give expression to the knowledge of facts, when necessary in evidence, is a legal obligation falling on all conjointly.[1]

1592. Therefore every man when summoned is under an obligation to give evidence.

1593. To fulfil this obligation, two witnesses may be called upon to travel fifty miles without remuneration.

1594. In the event of one of these two witnesses being discredited, a third is liable to be called, and so on.

1595. Any remuneration a witness may have received, other than the actual cost of transport, and then only if he himself possesses no means of transport and is not in a fit state to walk, will be held as sufficient reason for discrediting him.[2]

1596. A witness is not bound to travel a distance of 100 miles, but if he does attend the Court he may receive his cost of transport and maintenance.

Sub-section 2. Of the obligation of making an oath.[3]

[1] See p. 73, note 3.

[2] For a witness to receive his costs, unless he has to travel 100 miles, is held to be the same as if he received a wage for fulfilling a duty that he is not allowed to avoid ; it is as if he took a salary in order to say his prayers. (Perron, V. p. 264.)

[3] Perron translates : of suppletory oaths in cases where there is only one witness (V. p. 265) ; but the oath mentioned in rule 1597 would not be a suppletory one ; see p. 283, note 1 and p. 302, note 9.

1597. In a case of divorce or enfranchisement,[1] but not in one of marriage,[2] if the wife who alleges the divorce, or the slave who claims that he has been enfranchised, produce one witness,[3] the defendant will make oath,[4] even though he may have denied the pleadings. If he refuses to take the oath, he will be imprisoned, and if after a year he still refuses, the Law abandons him to his conscience.[5] [6]

1598. In a case where property is concerned,[7] a slave, even when not formally in charge of the goods in question,[8] or an adult of loose morals may lawfully take the oath, after the production of one witness, in order to complete the judicial proof required in such a case.[9]

1599. A minor will not be allowed to take such a suppletory oath and his father cannot be allowed to take his place.[10]

1600. If the plaintiff cannot furnish complete judicial proof, the defendant will make oath [11] in order to remain in possession.

1601. But if the suit is on behalf of a minor, the evidence of the

[1] Ordinary conclusive proof would in these cases be two male witnesses, vide rule 1562, p. 299.

[2] To prove marriage, nothing will do but two witnesses.

[3] Or the equivalent of one male witness, i.e. two female witnesses.

[4] That he has not divorced, etc ; if he so swears, judgment goes in his favour.

[5] And the suit drops. (Perron, V. p. 266.)

[6] The same procedure is allowed in cases of defamation and slander. (Idem.)

[7] Vide rule 1563, p. 300.

[8] Perron (V. p. 267) has it that in the case of a slave not duly authorized to trade, the master must make oath in his place. If duly authorized, the slave himself, in this case, may take the supplementary oath.

[9] Though these two classes are legally incapacitated from giving evidence, they in common with all adults, whatever their status, may make oath. The fact seems to be specially noted in this rule, as otherwise it might be thought that the same capacity was required in one making a supplementary oath as would be required in the second witness, ordinarily required to complete judicial proof.

It must here be made clear that there are four sorts of oath in Muhammadan Law.

I. The ' exacted ' or ' proffered ' oath, on account of presumption.

II. The oath relative to an alleged discharge referred to as the ' clearing ' oath.

III. The oath of him who denies.

IV. The suppletory or supplementary oath. (*Tuḥfat*, rule 213.)

Further the swearing capacity of individuals may be divided into three classes.

A. The adult possessing full witnessing capacity, vide rule 1509, p. 293.

B. The adult not possessing full legal witnessing capacity, e.g. women, slaves, etc.

C. Minors.

Class A may take the oaths I to IV.

Class B can never take oaths I and III but may take oath IV. As to taking oath II, the Law is undecided, but the *Tuḥfat* (cf., rule 224) seems to point to its being allowable. Class C. can never take oaths ; but oaths II and IV may be held over until they come of age. (*Tuḥfat*, note 147.)

Thus it is seen that the slave and the person of loose morals (class B) mentioned in rule 1598, can take the suppletory oath (IV).

[10] It is not generally allowable for a father to take the oath in his son's stead (*Tuḥfat*, rule 229.)

[11] Oath III.

single witness will be minuted by the Court,[1] so that the minor, on his coming of age, may complete the judicial proof by his oath.

1605.[2] After the defendant has made oath [3] in order to remain in possession, the adult plaintiff cannot thereafter produce a second witness to complete the judicial proof.

SECTION IV

OF SUBSTITUTE EVIDENCE [4]

Sub-section 1. Of the deputy witness.

1609. No one may give evidence against a decree unless the Ḳâḍi who pronounced it himself commissions a witness to do so in another Court.[5]

1610. No one may act as deputy witness unless specially asked to do so by the original witness, unless the original testimony was given in Court.[6]

Sub-section 2. Of the original witness.

1611. Substitute evidence is allowed when the original witness is absent and cannot be compelled to attend.[7]

1612. In criminal cases it is not sufficient that the principal witness [8] should be at a distance from the Court of a three days' march.

1613. Substitute evidence is allowed in the case of a deceased witness or of one who is very ill.

[1] And on the defendant taking oath III, the goods in dispute are sequestrated by the Court until the minor comes of age. If, on the other hand, the defendant denies the pleadings but does not take the oath, judgment is at once given for the plaintiff. (*Tuḥfat*, rules 225–227.) Perron (V. p. 268) has it that the object in dispute remains with the defendant until the minor takes the suppletory oath on his majority.

[2] Rule 1605 should be read in conjunction with rule 1600.

[3] In this case the plaintiff has produced one single witness but has not taken the suppletory oath, i.e., he has not furnished complete judicial proof.

[4] Or 'evidence of testimony': *Shahâdat ala shahâdah*. (Abdur Rahim, p. 379. It must be remembered that written depositions are practically unknown and that in any case more weight is attached to verbal testimony than to written.

By substitute evidence is meant testimony transmitted by a deputy witness from what he has heard the original witness lawfully testify, or from another deputy witness.

[5] This appears to be the meaning of the rule, but both Perron and Seignette are very obscure. In Muhammadan Law it would be conceivable for a Ḳâḍi to have a qualm of conscience after delivering a judgment not based exactly on the dispositions of the Law and then commissioning a deputy witness to give evidence against it in his own or another Court. But this elucidation is given under all reserve. Cf., p. 287. As to another Court reversing a judgment, see p. 287, note 5 (c).

[6] Thus what is here termed substitute evidence is in no sense hearsay evidence as we understand it.

[7] Vide rule 1593, p. 301.

[8] The rules that apply to ordinary witnesses in Court apply also to the 'principal' or 'original' witness here referred to.

Sub-section 3. Of the number of deputies.

1616. Substitute evidence is only admitted if given by at least two deputies.

Sub-section 4. Of the effect of substitute evidence.

1618. Substitute evidence is equivalent to ordinary evidence.

1619. The deputy witness may himself accredit [1] the principal witness.

Section V

Of Retraction of Testimony

Sub-section 1. Its effect in criminal cases.

1621. If, before sentence is pronounced, the witnesses declare that they have been mistaken as to the identity of the prisoner, their evidence is altogether put aside.

1622. A judgment stands annulled if the falsity of the evidence on which it rests becomes manifest, as in the case of the victim of a murder being found alive or a fornicator being proved to be a eunuch.

1623. Retraction by a witness after judgment is pronounced only entails his pecuniary responsibility.[2]

1624. If the accused has been executed the retracting witness will only be held liable for blood-money,[3] even though he had wilfully perjured himself.[4]

Sub-section 2. Of the punishment of false witnesses.

1627. False witnesses are liable to a correctional punishment.[5]

1628. If false witness is borne in a case of fornication or adultery, the four witnesses are liable to punishment as for slander,[6] whether they retract or not.

[7] **1636.** A Ḳâḍi who has condemned, though he knew the falseness of the evidence, is liable to retaliation.[8]

Sub-section 3. Of the civil effect of perjury.[7]

[1] For the meaning of 'accrediting' a witness see p. 276, note 1.

[2] And does not affect the decree of the Court. But in Shâfi'i Law, if retraction took place after judgment but before execution of the order of the Court, the judgment loses its effect in a criminal matter, though not in a civil one. (*Minhâj*, III. p. 420.)

[3] *Diyah*, blood-money, see p. 316.

[4] The witness may further be punished for perjury, see rule 1627. In Shâfi'i Law, such a witness would be liable to retaliation, or to the payment of the *diyah*.

[5] *Ta'zîr*, see p. 347; cf., also p. 280.

[6] For slander, see rule 1964, p. 333.

[7] Rules 1629–1635 and 1637–1658 contain nothing of practical importance.

[8] As also the false witnesses in Shâfi'i Law. (*Minhâj*, III, pp. 108, 421.)

Section VI

Of the Defence.

Sub-section 1. Of the Ḳâḍi's appreciation of contradictory evidence.

1659. As long as the evidence of different witnesses is not incompatible the one with the other, it is the sum total of such evidence that is given effect to by the Ḳâḍi.[1]

Of two contradictory testimonies, the one will be preferred which establishes the origin of property.[2]

1661. The moral character of the witnesses rather than their number will be taken into consideration by the Ḳâḍi.

1662. The Ḳâḍi will likewise prefer the evidence of two male witnesses rather than that of one male and two female and the latter will be preferred to that of one witness together with the suppletory oath of the party that produces that single witness.[3]

Sub-section 2. Of the fact of possession.

1663. In the absence of any other reason for preference, the party who proves itself in possession of the thing in question, will obtain judgment after taking the oath.[4]

1664. The party that proves its title to property has the advantage over the one which only proves possession.

1665. If A proves the transfer by B of property to himself, he will obtain judgment over B who opposes the title to the property and the continuity of its possession.

1666. The fact of possession is established by peaceful, non-precarious and uncontested enjoyment during a period of about ten months.

[1] Example : one witness declares that the defendant consented to exchange his gown against a hundred measures of corn ; another witness declares that he consented to exchange two gowns in addition to the first for a hundred measures. The judgment will then be that the defendant must hand over three gowns in exchange for two hundred measures of corn. (Perron, V. p. 305.)

[2] Example : one witness testifies that the cloth in question belongs to Amadu and another testifies that the cloth belongs to Moma and that he wove it or that it was woven in his house ; the judgment will be for Moma. (Idem.)

[3] The effect of these rules of evidence is that the functions of the Ḳâḍi are limited to seeing that the legal formalities prescribed for each method of proof have been complied with. The only latitude allowed him is that of appreciating the moral worth of the witnesses. Thus proceedings in Court are but a sort of tournament over which presides an impassive judge whose function is to give effect to the issue. One may remark, that when a judge's security is not well assured and when he receives no salary, he runs the risk of being attacked and his judgments challenged. Thus he tries to minimise the small powers conferred on him by the Law in order to diminish as far as possible his own responsibility. Under these circumstances a judge will avoid coming to a conclusion and will eventually make it appear dependent on some incident independent of his personal initiative. Cf., Morand, pp. 318–333.

[4] Here possession is considered the equivalent of one witness's evidence and the oath is a suppletory one. This is one of the four cases in which no witness need be produced to obtain judgment. Cf., *Tuḥfat*, note 88.

1668. The proof of a sale by C to the plaintiff A is not sufficient to establish A's title against the defendant B who is in possession.[1] But if it is proved that B originally confessed C's right, legal possession will be presumed to have continued in C.

1669. If M and N both claim a thing in L's possession and the proof adduced by M and N is both contradictory and equal in weight, the thing in dispute remains with L.

1670. If the object was in no one's possession or was possessed in common by M and N, it will be divided proportionally to each one's claim on it.

1671. The fact of possession, followed by a long interruption, is not sufficient to obtain re-entry.

Sub-section 3. Of evidence on questions of religion.

Sub-section 4. Recovery of possession.

1674. To recover possession of one's property oneself,[2] wherever one finds it, is lawful, provided one does not take the law in one's hands nor employ dishonest means. Further, the recovery must give rise to no disorders.

Sub-section 5. Of remands.

1676.[3] The Ḳâḍi may grant a remand to enable the plaintiff to bring forward a second witness instead of taking the oath, in which case the defendant will be called upon to give security, for, if the plaintiff had wished it, he could have taken the oath and thus at once have won his case.

Again, if the plaintiff has produced proof of the defendant being his debtor and the latter requests a remand in order to bring forward rebutting evidence, or in order to go through his accounts, etc., it will be granted him on his giving security for the debt.

1677. But if the plaintiff has called no witnesses, the defendant can only be made to give bail for his appearance in Court ; but even this is doubtful.

1678. In a noxal action, the slave is the defendant on the criminal side, his master on the civil.

Sub-section 6. Of the taking of the oath.[4]

1679. The formula of every oath is : In the name of God, besides whom there is no other god,[5] I swear that. This formula is

[1] Cf., the Roman Law maxim : *In pari causa melior est causa possidentis.*

[2] Including what is owed to one, or its equivalent in kind or value in money, either with or without the knowledge of the debtor or holder. (Perron, V. p. 319.)

[3] Rule 1676 is translated from Perron, V. p. 320.

[4] For the various sorts of oaths see p. 302, note 9.

[5] In Hausa form : *Bismi allahi errahmani errahimi.*

obligatory, even for the people of the Book[1] ; yet certain commentators have written that a Christian only swears 'in the name of God.'

1680. When the value of the thing in litigation amounts to a quarter of a *dînâr*,[2] the oath is taken in the mosque, church or synagogue, in order to give it more solemnity.

1681. The oath is to be taken standing, and it is not necessary to face towards the *ḳiblah*.[3]

1683. Women may take the oath.[4]

Sub-section 7. Of the intervention of a third party.

1684. When a debtor alleges that he has paid his late creditor, the oath [5] can only be proffered to that heir of the creditor who is supposed to know about the payment, and then this heir would only swear to the effect that he has no knowledge of the payment.[6]

1685. In the case of a sale for a certain amount of money which the buyer sends to the vendor, if the vendor declares that the amount is not correct, the buyer will be required to admit or deny the charge. If he admits, the conclusion of the matter is simple ; if he denies, he will have to make oath that he paid the exact sum.[7]

1686. A declaration on oath need not necessarily depend upon absolute and incontestable certitude of the fact declared. But in every case the witness's certitude on oath must depend upon his clear and intimate belief that there is neither error, nor falsehood, in what he declares.

1687. The defendant, when making a declaration on oath, must declare in so many words that he does not owe the sum in question, nor any fraction of that sum ; that he does not owe it on account of the transaction alleged by the plaintiff, nor on any other account.[8]

[1] Christians and Jews.

[2] A quarter of a *dînâr* would be 2*s*. 7½*d*.

[3] The *Tuḥfat*, rule 206, says it is necessary to face towards the *ḳiblah*.

[4] This disposition is one of Muḥammad's improvements on Jewish Law.

[5] This is oath II, relative to an alleged discharge, see p. 302, note 9.

[6] And judgment goes against defendant, supposing he has no evidence. If, on the other hand, the heir refuses to take the oath this refusal becomes the equivalent of one witness's evidence on behalf of the defendant which he must then turn into full judicial proof by taking the suppletory oath ; upon which judgment goes in his favour. If, again, the heirs bring forward one witness in support of their claim and one of the heirs takes the suppletory oath, judgment goes against defendant. Cf., Perron, V. p. 328 ; *Tuḥfat*, note 136.

[7] This is oath I, see p. 302, note 9.

[8] The words of the declaration are dictated to the declarant by the Ḳâḍi or officer deputed for the purpose and the declarant repeats the words ; cf., p. 284, note 2, and p. 273, note 1. In Shâfi'i Law it is even laid down that the true import of the declaration on oath is that given by the intention of the judge when he framed the declaration, and not that of the declarant. That is why no mental restriction on the part of the declarant, nor any interpretation of his contrary to the sense of the words, nor any reservation as to not having understood the judge, will avail to lessen the sin of perjury. (*Minhâj*, III. p. 436.)

Sub-section 7. Of the intervention of a third party.

1689. When the defendant alleges that the chattel belongs to a third party, this allegation does not preclude the plaintiff from producing proof of his right to it.

1690. If the plaintiff produces no proof and the third party is present and intervenes, the chattel will be adjudged to him on the strength of the defendant's allegation and after the oath has been exacted[1] from the intervener:[1] at the same time the oath will also be exacted[1] from the defendant, and if he refuses it, he will have to pay the plaintiff the value of the chattel which, by his allegation and on the intervener's oath, has passed into his possession.

1691. If the third party, alleged by the defendant to be the true owner of the chattel is absent, the defendant will either have to produce proof of his allegation or take the oath,[1] in which case judgment is given in favour of defendant, but the effect of the judgment will be in favour of the third party. But if the defendant does not produce proof or take the oath, judgment will be in plaintiff's favour.[2] In either case the third party, on his return, may support the defendant's allegation and proceed against whichever party obtained judgment.[3]

1692. The party that has proffered the oath to the other side, knowing that he had witnesses who could be called, will no longer be permitted to produce the evidence of these witnesses.[4]

Sub-section 8. Of the refusal of the oath.

1693. In any matter other than of personal status, the refusal of the defendant to take the oath proffered him by the plaintiff entails judgment on behalf of the latter only if he has furnished a beginning of proof and takes the oath.

1694. When the oath is proffered, it is incumbent on the Ḳâḍi to inform the party to whom the oath is proffered of the judicial consequences of a refusal on his part.

1695. Once refused, a proffered oath can no longer be accepted.

1696. The plaintiff, however, may be allowed to renounce after having consented to take the oath.

1697. Silence is not refusal and a certain time may be allowed to elapse before the proffered oath is taken.

Sub-section 9. Of prescription.[5]

[1] In all these cases the oath is exacted as there is presumption.

[2] On plaintiff taking oath IV, the complement of which (equivalent to one witness's evidence) being the fact of refusal of oath I by the defendant; cf., p. 320, note 9.

[3] Seignette notes this case as one where an intervener may get a judgment reversed.

[4] Cf., *Minhâj*, III. p. 439.

[5] Abdur Rahim writes (p. 281): according to the strict theory of Muhammadan Law a thing that belongs to another cannot be acquired by mere possession,

1698. Ten years' peaceable enjoyment of possession without its being called in question bars all action against the possessor [1] unless he be the claimant's relative, partner or co-proprietor, or unless, in the case of a house, the possessor was in permissive occupancy only.

1699. Where the claimant is the possessor's partner or co-proprietor, prescription will only hold good from the date on which the possessor affirmed himself in possession by removing an existing construction or building a new one.

1700. Where the claimant is the possessor's relative, prescription only arises after a period of forty years from the time at which the possessor affirmed himself in possession in the manner stated in the preceding rule.

1702. In matters of personal property and where the claimant is a relative, partner or co-proprietor, the period of prescription is the same as in questions of real property. But where the claimant is a stranger to the possessor, the period of prescription is three years.[2]

however long. The acquisition of rights connected with property in the nature of easements may be acquired by prescription.

[1] Perron (V, p. 335) mentions a saying of Muḥammad to this effect.

[2] In the matter of debts prescription only comes into force after twenty years, according to some jurists ; after thirty years according to Mâlik ; but according to others, prescription never touches a debt that has been acknowledged, as it is a universally admitted principle that the rights of a Muslim to what is owed him never lapse. (Perron, V. p. 338) ; cf., p. 308, note 5.

The *Minhâj* apparently makes no mention of prescription.

In Nigeria the obligation to pay a debt incurred between men of the same town, i.e., whose families are known to each other, never lapses. The Hausa expression *bashi ba ya ruba* contains the principle of law.

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CHAPTER XL

HOMICIDE [1]

SECTION I

OF MURDER

Sub-section 1. Of the right to retaliation.

A. *Of those liable.*

1703. Whoever has wilfully committed homicide will be dragged, a rope about his neck, by judicial authority before his victim's nearest relation, in order that the latter may inflict upon his person the punishment of retaliation. This applies only to individuals who have attained their majority, who are in full possession of their faculties, who are either free or slaves, but who are not tribute-paying Unbelievers. Moreover, the murderer must have been, at the time of the murder, of equal or inferior rank to the deceased, with regard both to his status and the civil rights [2] conferred on him by the true Faith, except in the case of the murder having been committed for the sake of robbery or pillage.[3]

The person of the murderer is inviolable except as regards him

[1] Under this heading are included all crimes of violence to the person (*jinâyah*). In Muhammadan Law, murder is not a crime, but a tort, since the remedy lies with the individual and not with the public. 'The principle is that the Law looks to the loss caused to the person injured, and is not, as a general rule, concerned with the moral culpability of the person by whose act it is caused. Thus, if injury to a man's person or property is caused directly by an act of another person. . . the Law holds the latter responsible whether such act was intentional or accidental. Nor would it make any difference if the person who caused the loss happened to be an infant or a lunatic.' (Abdur Rahim, p. 352).

This chapter on Homicide possesses but a theoretical interest, for it deals principally with retaliation (*lex talionis*), blood-money, and the *extraordinary* proof admitted in the case where the deceased man was a Muslim. Even in Muhammadan-governed countries, wrongs against human life and body have long been treated as crimes. Lane (I. p. 133) writes of Cairo early in the nineteenth century: 'the Government seldom allows a composition in money to be made.'

[2] All Muslims, not being slaves, are equal as among themselves; sex or age do not constitute inequalities of condition.

[3] In which case from a private wrong or tort the murder becomes a public wrong or crime for which a *ḥadd* punishment is applicable; see Ch. XLVI, p. 343.

upon whom devolves the right of retaliation; but the latter, if he has exercised his right on his own authority, is liable to a correctional penalty.[1] Again, anyone who puts to death an adulterer or adulteress or a renegade, without an order from the sovereign, will himself incur the punishment of retaliation; the same applies to whoever has cut off the hand of a thief.

1705. Whoever grants a full pardon without limitations has no claim to blood-money.[2]

1706. However, if there are circumstances that would lead to the presumption that he intended to place limitations upon his pardon, he may be permitted to make oath.

1707. If the murderer refuses to pay blood-money, the deceased's relative retains his right to retaliation or he may abandon the right. Thus he can spare a slave whom he wishes to acquire *noxalis deditio*.[3]

1711. A murderer of equal or inferior rank to that of his victim is liable to retaliation. Thus a Scriptural man or woman,[4] even though free, is liable for having killed a Muhammadan, even though the latter may have been a slave.[5]

1714. Where the murderer is a slave and his guilt is judicially established, the heir of the deceased has the right of choice as between retaliation and compensation. If he chooses the latter, the slave's master has the choice of surrendering his slave or of paying the compensation.

B. *Of cases in which the law of retaliation is applicable.*[6]

1715. When death has followed hurts wilfully occasioned, as with a light stick, but with no intention of causing death, still the offender is liable to the law of retaliation; the same applies when death has been occasioned by strangulation, compression or want of food.

1716. There is no need of the oath of the *conjuratores*[7] to prove

[1] i.e., a *ta'zîr* punishment. It is clear that retaliation, *kiṣâṣ*, 'is not solely a private right, but that the right of the public is also mixed up in it. Hence the State takes charge of its supervision and imposes strict conditions with a view to prevent the injury caused to the wrong-doer being in excess of what was inflicted by him.' (Abdur Rahim, p. 358.)

[2] Or bloodwit, *diyah*.

[3] i.e., the surrender of the slave murderer by his master in compensation. The *diyah* for which the master of the offending slave is liable, is paid by him to the heir of the deceased by means of the surrender of the slave who caused his death.

[4] See p. 103, note 2.

[5] But in Shafi'i and Mâliki Law a Muslim cannot be put to death for the murder of an Unbeliever, for the Prophet has said: A Muslim shall not suffer death for an Unbeliever. It is otherwise in Ḥanafi Law. Cf., Hughes, p. 421.

[6] Shortly and generally stated, retaliation is only lawful in cases of murder, manslaughter as defined in English Law, and unlawful wounding; subject, however, to exceptions due to difference of status as between the aggressor and his victim.

[7] i.e., a series of fifty solemn oaths taken by at least two male agnates, in Arabic, *kasâmah*. See p. 318, note 4.

that a wound was the cause of death, when death was instantaneous, or in the case of the victim succumbing without regaining consciousness.

1717. Every wilful act, committed with a criminal intention, such as pushing into the water a person who cannot swim, renders its author liable to retaliation if death follows ; but if the act was an involuntary one, or voluntary but without criminal intent, then its author is only liable to the payment of the lawful *diyah*.

1718. The fact of having dug a well, even on one's own property, or of having placed a slippery substance on the path, or of having tied up a vicious horse near a road, or keeping in one's house a dangerous dog and one well known to be dangerous, with the intention of causing hurt to some one person ; all these acts render their author liable to retaliation if the death of the person has been caused thereby. But if he had no intention of harming anyone, or if another than the person he intended to harm should succumb, then he is only liable to pay *diyah*.

1719. Similarly, whoever causes another to commit any of the acts before mentioned, is liable to the same punishment as if he had been the actual author.

1720. Whoever wilfully places poison within reach of another, and this poison is unknowingly swallowed and death results, he shall be liable to the law of retaliation ; so also shall he be if he causes a venomous snake to bite another.

1721. Whoever pursues his enemy armed with a dart is liable to the law of retaliation, even though his enemy should only have succumbed to fright ; if, however, his enemy falls whilst fleeing, his heirs will have to take the *quinquagies* [1] oath.

1722. Whoever strikes or aims at another an unsheathed weapon, without pursuit and without ill-will, will be liable to pay the lawful *diyah*, if such other shall have succumbed to fright.

C. *Of accomplices.*

1723. Whoever holds down another whilst the murderer strikes, is liable to the law of retaliation as an accomplice.

1724. Many may be liable to the law of retaliation on account of the death of one only : thus (*a*) all the accomplices in a crime, even when the deceased succumbs to lashes ; (*b*) the moral agent as well as the physical actor, he who shall have instigated the actor, as well as he who has so been instigated, the father or the master who has instigated the child, the master who has instigated his slave even though the latter be of age.

1725. If, however, the agent has allowed himself to be instigated, without having taken any personal risk, he alone will be liable to the law of retaliation.

[1] See p. 318, note 4.

1726. The accomplice of a minor is liable to the law of retaliation if co-operation was premeditated, but a crime committed by several without premeditation as between the actors, only gives rise to the payment of the lawful *diyah*,[1] if one of them struck involuntarily or was insane at the time.

1727. Is he who strikes another liable to the law of retaliation when his action is followed by a mortal illness which is not the ordinary consequence of such an action? The question has been answered in the affirmative; but it has also been ruled that the offender is only liable to pay half the lawful *diyah*.[1]

1728. In every encounter or fight between two armed or unarmed men, on foot or on horseback, if both combatants succumb, retaliation has taken place; if not, the survivor becomes liable to the law.[2]

1729. An encounter is presumed to have been voluntary until the contrary is proved; the contrary presumption obtains in the case of a collision between two boats.

1730. However, there is no civil or criminal responsibility incurred if it was a case of irresistible overwhelming necessity, as in the case of a manœuvre in order to escape shipwreck, or in the case of the necessity of navigating at night without lights.

1731. Except in the case of absolutely overwhelming necessity, if the encounter or collision has taken place without criminal intent, payment of the legal composition for the blood of the persons killed or wounded will be due from the *ʿâḳilah*[3] of each one of the offenders; but compensation for horses killed in the encounter or for slaves and other goods lost in the collision will be due from each individual offender.

1732. When homicide has been done by several, each will be liable to the law of retaliation if there had been a plot; if not, he who inflicted the most grievous hurt will alone be liable.

D. *Of change of status.*

Sub-section 2. Of retaliation for wounds received.

A. *Of those who are liable.*

1735. The exercise of retaliation for hurts and wounds received is governed by the same rules as for homicide, in so far as the criminality of the act, the responsibility of the offender, and the status of the injured person are concerned, except that the offender is not liable

[1] For the tariff see p. 316.

[2] Thus the law practically prohibits duelling. Homicide in self-defence or in defence of property entails no punishment.

[3] The *ʿâḳila* consists in the first place of the male heirs and may extend to the whole tribe of the offender. In pre-Islâmic times the *diyah* (cf., *piaculum* in Roman Law) was borne by the *ʿâḳila* and this custom was legalized by the Prophet as it conforms to the principle that mutual assistance is due amongst Believers. Cf., Perron, II. p. 643; V., pp. 546, 555.

to retaliation if his status is inferior to that of the person whom he has injured.[1]

1736. Where, without there being a plot, many individuals have struck others, each of the assailants will be liable to retaliation for the wounds dealt by them individually, if it be possible to distinguish them.

B. *Of the cases in which the law of retaliation is applicable.*

1737–1753. Wounds wilfully inflicted render the assailant liable to retaliation. The payment of *diyah* takes the place of retaliation in those cases where the offender would lose a sound limb or organ in place of the already diseased or maimed limb or organ of his victim. Neither retaliation nor the payment of *diyah* is inflicted in the case of a slap or on account of the pulling out of hair, but the assailant will be liable to correctional punishment. Where a tooth has been wilfully knocked out, the offender will be liable to retaliation; but if involuntarily, then he is only liable to pay *diyah*.

Sub-section 3. Of lawful retaliation.

A. *Of those who may exercise the right of retaliation.*

1754–1766. The right of retaliation belongs to the victim's nearest agnate.

B. *Of the execution of the right of retaliation.*

1767–1768. In the case of murder, the murderer may be put to death by the deceased's nearest agnate, but all useless cruelty is forbidden. In other cases the execution of the retaliation will be in the hands of an expert practitioner paid by the wounded man or his family.

C. *Of the delay of execution.*

D. *Of the prerogative of mercy.*[2]

1775. A pardon accorded by one of the heirs of the victim, if of not inferior degree of affinity to any of the other agnates,[3] cancels the right of retaliation possessed by the other heirs.

1776. In the order of precedence among agnates, that of the daughter of the victim is superior to that of the latter's sister consanguinean for the purpose of exercising the right of retaliation or of pardon.

[1] Retaliation for wounds is lawful as amongst equals, i.e., when both the aggressor and the sufferer are Muslims, but not so when the former is a slave and the latter a Muslim. In such a case, the *diyah* would be payable by the slave's master, whose property (i.e. the slave) thus escapes depreciation in its market value.

[2] Hughes (p. 421) quotes Al-Baiḍâwi, the commentator, in writing on Sura ii., 'this is an alleviation from your Lord and a mercy,' who says: 'in the Jewish law retaliation for murder was compulsory, but in the law of Christ the Christians were enjoined to forgive the murderer, whilst in the Korân the choice is given of either retaliation or forgiveness.'

[3] Agnation is kinship by the father's side.

1781. The right of retaliation is transmissible by way of succession, just as property would be.[1]

E. *Of composition by agreement.*

1782. In the case of wilful wounding or murder, the parties may compromise the right to retaliation by the payment of a sum either greater or less than the lawful tariff.

1783. In the case of involuntary wounding or homicide, the parties may compromise as to the amount of the *diyah* [2] and the rules as to the transfer of debts then apply.

1784. In the last preceding case no responsibility is incurred by the *ʿâḳilah* [3] of either party unless the *ʿâḳilah* has accepted the terms of the compromise.

F. *Of Execution.*

1790. The murderer will be subject to the same kind of death as he himself has caused, even though he should be burnt alive.

1794. In every case, the murderer will be decapitated on the demand of him who has the right to exercise retaliation.

Section II

Of Homicide without Intent

Sub-section 1. Of the *diyah.*

A. *Of the tariff for manslaughter.*

1800. Amongst non-nomadic people,[4] as in Syria, Egypt and in Morocco, the tariff for involuntary homicide is 1,000 *dînâr* [5]; in Persia it is 12,000 *drachmae*,[6] with a proportional augmentation when there are aggravating circumstances.

1801. The tariff is of one half the above when the victim was a Jew or a Christian.

1803. Again, the legal tariff is halved when the victim was a woman.

1804. The *diyah* for a slave is his market value.

1805. The tariff for procuring abortion is one tenth that of the mother. The guilty party may, however, compound by handing over a male slave or a girl slave from seven to eight years old.

1811. The *diyah* for abortion is divisible among the child's heirs, if the child had been born alive.

B. *The tariff for wounds.*

[1] This would appear to amount to legalised vendetta.

[2] i.e., it may be greater or less than the amount judicially fixed or it may be paid in other coins than the legal *dînâr*, or in goods, or again the terms of payment may be varied.

[3] The responsibility for the *diyah* usually rests with the *ʿâḳilah*, the actual aggressor contributing his share as a member of the *ʿâḳilah*. Cf., Perron, V. p. 547. See also p. 314, note 3.

[4] The tariff for nomads is expressed in camels.

[5] About £500 (Lane, I. p. 132.)

[6] About £300. (Idem.)

1812. The tariff for wounds is arrived at by assuming the damage relatively to the total market value of the sufferer had he been a slave. It is fixed by the Ḳâḍi.

C. *Of the tariff for loss of the faculties.*

1817. The tariff is as for homicide in the following cases: (*a*) loss of reason, of hearing, of sight, of speech, of taste or of the generative organs; (*b*) when there has been inoculation of leprosy; (*c*) mutilation of the ears, scalping; (*d*) amputation of the hands, feet or the end of the nose.[1]

D. *Of the cumulative tariff.*

Sub-section 2. Of those who are liable to pay the *diyah*.

A. *Of the responsibility of the ʿâḳilah.*

1834–1838. In the case of a Muslim,[2] his *ʿâḳilah* is responsible for the payment of the *diyah*. In the case of an Infidel, his village is liable.

B. *Of the methods of contribution.*

1839–1842. Every member of the *ʿâḳilah* contributes according to his means.

C. *Of the terms of payment of the diyah.*

1834. The *diyah* for homicide is payable in three annual instalments due at the end of each period of one year counting from the date on which judgment was given.

1844–1847. Less time is given in which to pay the instalments as the balance due decreases.

Sub-section 3. Of accessory penalties.

A. *Of religious expiation.*

1848. A free Believer, even though he be a minor or a lunatic, who has involuntarily killed another Believer, should be compelled to make expiation by enfranchising one of his Muslim slaves, or, if he cannot do this, by fasting for two consecutive months, as when a Believer has cursed his mother.

1849. No expiation or *diyah* is due on account of suicide or homicide in self-defence.

1850. There is a moral obligation to make expiation when a Believer has brought about abortion through blows inflicted by him, or when he has murdered his slave.[3]

B. *Of penal expiation.*

1851. An accused found guilty of wilful homicide, no matter what may be his status and even though he may not be liable to retali-

[1] Khalîl then proceeds to give minute rules for the appraisement of damage done to every part of the body.

[2] i.e., one who has involuntarily caused death or inflicted a wound.

[3] It would appear that a master may murder his slave with impunity as regards retaliation, but he does not escape the penal expiation mentioned in rule 1851.

ation, or even when the prerogative of mercy has been exercised, will be sentenced to one year's imprisonment and one hundred lashes, though his victim may only have been a slave [1] or an Infidel.

1852. He who has been accused of murder on strong presumption, but has escaped retaliation by taking the oath which the *conjuratores* have declined, will be sentenced to one year's imprisonment and one hundred lashes.

Section III

Of Proof

Sub-section 1. Of extraordinary proof.[2]

A. *Of the presumptions* [3] *which admit of extraordinary proof.*

1853. Where the victim was a Muhammadan of either sex, a grave presumption of murder or of manslaughter allows of proof being completed by the oath of the *conjuratores*,[4] the victim's nearest male heirs.

1854. A presumption is said to be grave when the Believer, a freeman and of age, has named his murderer before dying, even if he had added that there was no intent.

1855. The victim's bad reputation does not take away from the value of his dying declaration, even though his assailant should be known as a person of irreproachable character.

1856. Again, the oath will be taken when a son has accused his own father, or the wife her husband.

1857. In every case the corpse must show signs of violent death.

1858. When the dying declaration does not specify whether there was intent or not, the *conjuratores* will have to make the point clear in their oath.

1859. In no case can the *conjuratores* contradict the terms of the dying declaration, nor may they be allowed to retract the terms of their oath. Again, the oath of some of the *conjuratores* who declare that the homicide was wilful will not be received if the others declare

[1] Even his own slave. (Perron, V. p. 459.)

[2] The ordinary proof (rule 1888) as set forth in the chapter on Evidence is applicable in all cases, but where this fails and the victim of the murder or manslaughter is a Muhammadan, *extraordinary* proof is admitted. Though this *extraordinary* proof is now of no practical value to us, still it is so curious that a selection from the rules is given.

[3] In Arabic : *lauth*, i.e., circumstances which give a strong presumption in favour of the prosecutor, that is, the nearest male agnate.

[4] The oath of the *conjuratores* or the *quinquagies* (i.e., fifty times) oath (Arabic, *kasâmah*) probably dates from pre-Islâmic times and is found among the ancient institutions of the Franks. The *modus operandi* is as follows : where in the case of a slain Muhammadan there is strong presumption of guilt but not actual judicial proof the heirs of the deceased may make oath that they verily believe the accused to be the murderer. The identical terms of the oath is repeated fifty times by the heirs (i.e., the *conjuratores*), each heir contributing to the total of fifty oaths *pro rata* to the share of the *diyah* he expects to receive if paid over.

themselves unable to swear on that point or decline to make oath at all.

1860. Those of the *conjuratores* who declare that the homicide was involuntary will be allowed to take the oath and to receive their share of the *diyah*.

1861. When all the *conjuratores* take the oath and some swear that the homicide was wilful and the others that it was not, all the *conjuratores* being agnates of the same degree, the *diyah* ordered will be as for involuntary homicide. But if some swear that the homicide was wilful and the others refuse to make oath, the former lose their right.

1862. There will be a grave presumption of homicide when death occurs only after a certain lapse of time and two witnesses declare that the blows were dealt in their presence, or that the victim designated his assailant to them before he died. In these two cases, the *conjuratores* will have to declare in their oath that the blows were inflicted with intent and that death was the direct consequence of the blows or wounds.

1863. There will be a grave presumption: (*a*) when a single witness declares that the wilful or the unintentional blow was dealt in his presence and that death was certain to follow; (*b*) when a single witness declares having himself heard a dying declaration of wilful homicide; (*c*) when that dying declaration, being an accusation of wilful or of involuntary homicide, is judicially reported and is corroborated by the evidence of a single witness to the deed; (*d*) when the assailant confesses that he dealt the blow, if his confession is corroborated by the testimony of a witness in a case of involuntary homicide which engages the responsibility of the assailant's *ʿâḳilah*.

1864. Where the evidence of two ocular witnesses is contradictory, their testimony will not be received.

1865. There will be a grave presumption when a single irreproachable[1] witness declares that the blows were inflicted in his presence or that he has seen the victim with the blood-stained assailant near him.

1867. The finding of the body in a village or in a house is not sufficient presumption enabling the heirs to take the oath of the *conjuratores* against the inhabitants of the village or house.[2]

[1] See p. 283, note 4.

[2] To allow the *quinquagies* oath in such a case would be to facilitate an accusation of murder against the inhabitants of a village on the part of a group of relations (Perron, V. p. 471). On the other hand Lane (I. p. 133) writes: 'The price of blood . . . is also incumbent on the inhabitants of an enclosed quarter or the proprietor or proprietors of a field, in which the body of a person killed by an unknown hand is found.' Abdur Rahman (p. 359) also says: 'if a dead body is found in a certain locality with signs of violent death on it, the heirs of the deceased are entitled to call upon fifty inhabitants of the place whom they may select to take the oath that none of them killed him. If they

1868. When it is proved by the evidence of two witnesses who saw the deed that a murder has been committed but that the murderer himself disappeared, unrecognized by them, into a certain known group of people,[1] each one of the group will be called upon to swear fifty times as to his innocence and to pay his share of the *diyah*. But if one or more refuse to take this oath, he or they alone will be liable to pay the *diyah* and there will be no call on the heirs to take the oath of the *conjuratores*.

B. *Of the oath of the conjuratores.*[2]

1871. The oath of the *conjuratores* consists in fifty solemn oaths pronounced consecutively.

1872. The oath can be based on a personal conviction as to the guilt of the accused and such a conviction may be sworn to even by a blind man or one who was far away.

1873. In cases of involuntary homicide the oath will be taken by each one of the heirs of the victim, *pro rata* to his share in the *diyah*.[3] If there be but one heir, even if a woman, he or she will take the whole of the fifty oaths.[4]

1878. In the case of a murder, the *conjuratores* must number at least two male agnates of the deceased.[5]

1884. If one of the *conjuratores* pardons the murderer, the others retain the right to their share of the *diyah*.

C. *Of the effects of this method of proof.*

1887. The swearing of the *quinquagies* oath gives the *conjuratores* the right to receive the *diyah* in cases of involuntary homicide, or to exercise retaliation[6] in the case of murder, but only as against the offender specially designated in the oath of the *conjuratores*.

Sub-section 2. Of ordinary proof.[7]

1888. Ordinary judicial proof is alone admitted when the sufferer

take the oath then all the inhabitants will have to pay blood-money ; otherwise they will be imprisoned. Similarly, if a dead body is found at the door of a man's house, he will be given the oath, and if he swears that he did not kill him, his *'âḳilas* will have to pay compensation.' There appear to be no parallel rules in Mâliki Law.

[1] This may refer to a group of the murderer's relations or, perhaps, to members of his guild.

[2] See p. 318, note 4.

[3] The share in the *diyah* is the same as in a succession.

[4] In the case of involuntary homicide the *conjuratores* need not be male agnates. In the case of a wife being the sole heir she would herself take the *quinquagies* oath but would only receive one quarter of the whole *diyah*, this being the fraction she is entitled to by the law of succession. The remaining three quarters of the *diyah* is remitted back to the payer, since the *bait al-mâl*, to which in the case of a succession it would escheat, cannot make an oath. Cf., Perron, V. p. 477.

[5] And women cannot be numbered among the agnates.

[6] Or to compound the right for blood-money.

[7] See p. 318, note 2.

is an infidel or a slave, and in cases of abortion. The evidence of a single witness brought forward by the prosecutor gives him the right to retaliation or to the *diyah* on his taking the suppletory oath.[1] Should the prosecutor decline the oath, the accused will be acquitted on his taking the oath as to his innocence. Should the accused decline to swear, he will be kept in prison until he does.

[1] See p. 302, note 9. The prosecutor must have been a witness to the deed, at any rate in the case of a murder, for it seems clear that a man cannot be put to death on the evidence of one witness, cf., rules 1562 and 1567. If there is only question of the payment of blood-money, then one witness and the oath of the prosecutor is sufficient.

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CHAPTER XLI

REBELLION[1] (*BÂGHI*)

Ibn-Arfa's definition: Rebellion consists in open and flagrant resistance to the orders of established government, if such orders are not contrary to Law; though resistance may have an excuse, as in the case of religious and political dissent.

SECTION I

OF REBELLION IN GENERAL

Sub-section 1. Of the nature of the crime.

1890. ANY group of Muslims who openly resist [2] the constituted and recognized sovereign in order to overthrow him [3] or to refuse payment of the taxes lawfully payable, is guilty of rebellion.

Sub-section 2. Of repressive measures.

1891. As long as the rebellion lasts, and even though its cause may be religious or political dissent, the legitimate sovereign may fight the rebels and employ against them all those means that are lawful in war against Infidels.

1892. However, the sovereign is not permitted to reduce the rebels to slavery, nor to burn their fruit trees, nor to carry their heads on lances, nor to impose a war tax on them.[4]

1894. Unless it is feared that they will resume the attack, their fugitives will not be pursued nor their wounded put to death.

SECTION II

Sub-section 1. Of amnesty for political crimes.

1896. If the rebellion was due to political or religious differences,

[1] The Law regards rebellion not so much as a crime as an act to be put down by force. The sovereign who is rebelled against must of course be a Muhammadan; the consideration of foreign domination is never once considered in any Muhammadan law book. Only in the event of Muslims being unable to profess their religion in full security, is it then considered obligatory on them to quit the country.

[2] It is not necessary that they should be armed. (Perron, V. p. 491.)

[3] Even when corrupt and unjust. (Idem.) For the Muhammadan conception of the State, the student is referred to Abdur Rahim, p. 383 et sq.

[4] Since they are presumed to be, after all, Believers and freemen.

the rebels, after their submission, may not be prosecuted for homicide nor for any damage done to property.

Sub-section 2. Prosecution for crimes at common law.

1899. When the rebels were not actuated by religious or political motives, they may be prosecuted for homicide and damage to property.

CHAPTER XLII

APOSTASY[1] AND BLASPHEMY[2]

SECTION I

OF APOSTASY IN GENERAL. OF THE WORDS AND ACTS THAT CONSTITUTE APOSTASY

Sub-section 1.

DEFINITION. To apostatise on the part of a Muhammadan is to be received into the faith of the Unbelievers and consequently to renounce the faith and orthodoxy of Islâm. By a Muhammadan is here understood one who confesses Islâm, to the extent, at least, of avowing the double profession of faith :—'There is no other God but God, the One, and Muḥammad is His Prophet,' and submitting to the obligations which this profession of faith entails.

Khalîl, in his definition, uses the word Muhammadan, Muslim, and not the word Believer, *Mu'min*, although the Muhammadan is the outcome of the Believer. He does this because man, unable to see into the conscience of others, should, when judging, stop at material demonstrations and physical acts.

Sub-section 2. Of those words and acts that constitute apostasy.

The crime of apostasy may consist in saying words in contradiction of the principles of Islâm, or by giving forth opinions implying renunciation of those principles.

Sub-section 3. Of those acts, doctrines or pretensions which constitute the crime of apostasy.

Any act which implies outrage to or renunciation of the faith of

[1] Apostasy (*irtidâd*) is one of those crimes for which a definite punishment (*ḥadd*) is laid down by the Law. It is looked upon as the most heinous of all crimes, one where, if Muhammadan sovereignty existed, the sentence of death would ordinarily be carried into effect. So much so is this the case that the *Mukhtaṣar* lays down none of those limitations and conditions usually prescribed in the case of offences punishable by *ḥadd*. The Law merely states that the apostate, convicted on the evidence of two witnesses, is to be put to death and his estate escheated to the public treasury. In this matter of apostasy, Mâliki law appears to be stricter than Ḥanafi law—even as might be expected ; cf., *Hidâyah*, II. pp. 183, 227, 235, 246, 467, 537, cited by Hughes, p. 16.

[2] For Blasphemy, see Section XIV. p. 327. The chapter is taken from Perron, V. pp. 497-528.

Islâm is held to establish the crime of apostasy. Thus, a Muslim is guilty of apostasy who : throws a copy of the Korân, or even a single letter of it, into the dirt : who wears any part of the dress of an Infidel ; or who practises witchcraft.

Section II

Of Evidence necessary to prove Apostasy and Blasphemy

The evidence of the two necessary witnesses [1] must be explicit and precise in details. Thus their testimony should show forth that the accused apostatised by such and such a declaration or doing so and so.

Section III

Of preventive Judicial Measures in the matter of Apostasy

An apostate is allowed three days in which to recant. If he fails to, he is put to death [2] on the evening of the third day, and the sentence is carried into execution whatever may be the sex,[3] status, or social condition of the apostate.

Section IV

Of the Goods of the Apostate whether Slave of Freeman [4]

The *peculium* of a slave who has apostatised belongs to his master in full property from the moment that the slave apostatised.

In the case of a freeman his estate is escheated to the *bait al-mâl*.[5]

Section V

Of the Child of the Apostate

The child of an apostate, whether he be major or minor, remains a Muhammadan in the eye of the Law. If the child manifests anti-Muhammadan tendencies, he will be brought back by force into the fold of Islâm.[6]

[1] Cf., rule 1562, p. 299.

[2] Lane, writing in 1835, describes the execution of a female apostate to Christianity, by strangulation followed by drowning in the Nile. Probably the last execution for this crime in the Ottoman Empire took place in 1844 when the British ambassador lodged a protest ; cf., Margoliouth, *Mohammedanism*, p. 104.

[3] A female apostate is put to death by Mâliki and Shâfi'i law (cf., Lane, I. p. 136), but not by Ḥanafi law (cf. *Hidâyah*, II. p. 227.)

[4] It is a rule of law that difference of religion is a bar to inheritance (Perron, VI. p. 434). In the same way a testamentary disposition becomes null and void in the case of either the testator or legatee apostatising. (Perron, VI. p. 203.)

[5] For *bait al-mâl* see p. 79, note 3.

[6] A child under the age of puberty who apostatises is kept under observation until he reaches his majority, when he is put to death if he does not recant. (Perron, I. p. 317.)

Section VI

Of Satisfaction for Crimes committed by an Apostate

Section VII

Of the Legal Consequences following on the Reversion of an Apostate back to Islâm

Section VIII

Of the Hypocrite or false Muhammadan

Section IX

Of the Apostasy of an Individual originally converted to Islâm through fear or need

Section X

Of the Punishment to be discerned to (*a*) the converted Muhammadan who does not fulfil his Religious Obligations; (*b*) the tributary Subject guilty of Witchcraft

In (*a*) a correctional punishment should be inflicted. In (*b*), if by his witchcraft narm has resulted to a Believer, the accused is either put to death or becomes a slave; if no harm has resulted, a correctional punishment is inflicted.

Section XI

Of the consequences of a Return to Islâm

Section XII

Of the Unbeliever's Conversion to another Infidel Religion

The Law has no concern whatever with an Infidel who passes from the religion of one set of Infidels to that of another set, for whatever their species of Infidelity, they are all one. And the word of the Prophet: Whoever changes his religion, kill him, only applies to that religion which is worthy of the name of religion, worthy of being publicly confessed, that of Islâm. This is the only religion of which the Law takes notice; the only one that the Law is bound to safeguard. Thus it is that the Law and the Faithful will never leave the renegade in peace.

Section XIII

Of the faith of a Minor; of that of a Lunatic

Section XIV

Of Blasphemy [1]

Sub-section 1. Of those kinds of blasphemy that entail the punishment of death.

[1] Arabic: *Kufr*.

The Law punishes with death he who has blasphemed against a prophet or an angel; recantation will not save the blasphemer from death.[1]

Sub-section 2. Of those blasphemous expressions that entail an ordinary correctional punishment.

Sub-section 3. Of those blasphemous expressions that entail a heavier correctional punishment.

According to Mâlik, whoever falsely gives himself out as a *sharîf* [2] should be severely punished.

Sub-section 4. Of blasphemy against God.

Blasphemy against God is considered and punished in the same way as blasphemy against the Prophet.

[1] 'Still more severe (than in the case of apostasy) is the law with respect to blasphemy. The person who utters blasphemy against God, or Muḥammad, or Christ, or Moses, or any Prophet, is to be put to death without delay, even though he profess himself repentant; repentance for such a sin being deemed impossible. Apostasy or infidelity is occasioned by misjudgment; but blasphemy is the result of utter depravity.' (Lane, I. p. 137.)

[2] Or descendant of the Prophet.

CHAPTER XLIII

FORNICATION (*ZINÂ'*) [1]

SECTION I

OF THE CRIME ITSELF

Sub-section 1. Of Fornication in the strict sense.

1936. EVERY Muslim [2] who has attained his majority and is responsible for his actions, commits the crime of fornication when he has intercourse, even if it be against nature, with a woman to whose sexual possession he had no lawful right.[3]

1937. Thus he who commits any of the following acts is guilty of the crime of fornication :—

(*a*) sodomy or sexual intercourse with other than a wife ;

(*b*) carnal intercourse with a dead body other than his wife's, or with a girl who has not reached the age of puberty ;

(*c*) connection with a female slave hired for the purpose or for any other purpose, or with a slave in favour of whom there exists a lawful cause of manumission, or with one that he knew to be a free woman ;

(*d*) he who unites himself in marriage with a woman perpetually barred to him by reason of affinity ; or who has connection with a slave, being his own property, who is likewise barred to him by reason of her affinity ;

(*e*) he who marries a fifth wife, when he has four already living ;

[1] The word *zinâ'* includes both fornication with an unmarried person and adultery with a married person. Cf., Korân xxiv. 2–5 ; Exodus xxii. 16, 17, 25–29. (Hughes.) The chapter is taken from Seignette.

[2] In this definition, Khalîl only indicates the male agent, but it is evident that such a designation necessarily includes the idea of another agent, for there cannot be fornication without two parties to the crime. One must also suppose that the female agent must be a Muhammadan and have reached puberty. (Perron, VI. p. 4.)

[3] The words 'no lawful right' mean no legal right of property from the sexual point of view ; thus a man has no discretionary sexual authority over his female slave during her menstrual periods nor over his male slave. The law explicitly recognizes the right of a man to cohabit with his wife or wives, or with his slave concubines, but not, for example, during their menstrual periods. An infringement of this rule would not, however, amount to illicit cohabitation. (Perron, VI. p. 5.)

(*f*) he who has connection with a female slave received by him as a security without obtaining her master's consent ;

(*g*) he who, before the distribution of booty, has connection with a female captive, or who unites himself in a foreign country with a Non-Muslim woman ; [1]

(*h*) resumed cohabitation with a wife irrevocably divorced, even during her period of retreat following such divorce ;

(*i*) intercourse with a woman whom he has divorced before consummation of the marriage, or with a slave whom he has freed, without marrying her.

(*j*) The woman who has intercourse with her male slave without having married him, [2] or with a lunatic, but not with a boy who has not arrived at puberty.

1938. There is neither crime nor misdemeanour when there has been error of person or ignorance of the law, if it can be presumed that the guilty party might have been ignorant or could have committed the error.

Sub-section 2. Of Unlawful Cohabitation.

1941. He who has sexual intercourse with a female slave lent him for the purpose is liable to punishment at the discretion of the Ḳâḍi.

1942. There is no crime or misdemeanour that can be imputed to a woman when she has been forced, nor when she has been sold as a slave by her husband in time of famine.

Section II

Of the Proof

1944. One single confession is sufficient to establish guilt, but not so should the confession be retracted, either formally or tacitly, and retraction is held to include the fact of running away whilst punishment was being inflicted.

1945. If there is no confession, guilt will be established by the concomitant evidence of four male witnesses who all at the same moment witnessed the crime. Condemnation will necessarily follow even should four women attest as to the virginity of the female party to the crime. [3]

1946. The pregnancy of a woman is sufficient to establish her guilt, if she is not under the authority of a husband or master who avows paternity.

[1] The meaning of this is uncertain ; Perron (VI. p. 9) has it, ' or who copulates with a woman in the enemy's country who has abjured Muhammadanism.'

[2] Such a marriage, though lawful, is not approved of by the law. (Perron, VI. p. 10.)

Such a marriage would probably be classed as *makrúh taḥrim*, that which is nearly unlawful.

[3] Korân, Sura iv. ; v. 19.

1947. It is no defence for a woman to say she had been forced, unless there be concordant circumstances.

Section III

Of Punishments

Sub-section 1. Of the greater punishment to be inflicted in the case of adultery and sodomy.

1948. A Muslim of either sex who is free, of age, and responsible for his actions, convicted of fornication when legitimately married and who has consummated his marriage, shall be stoned to death.[1]

1951. He who is convicted of sodomy shall be stoned to death whether he be Muslim or not, free or slave, married or unmarried; and the same shall be done to his accomplice, whether the parties be slaves or non-Muslim subjects or not.[2]

Sub-section 2. Of the simple punishment.

1952. A Muslim of either sex, free, unmarried, or married without having consummated the marriage, who commits fornication, shall receive one hundred lashes.

1953. The punishment will be reduced by one half if the guilty party is a slave.

Section IV

Of the Jurisdiction

1958. Prosecution and punishment in cases of fornication only lie within the jurisdiction of the magistrate, or, in exceptional circumstances, of the master of a slave.

1959. The magistrate is not permitted to base his finding on his personal convictions, but only on the evidence required by the Law.

[1] In contrast to the sternness of Muhammadan Law, Wilson (p. 139) writes as follows: 'The combination of British-made criminal law and Muhammadan civil law (i.e., the Indian Penal Code) has produced the singular result that in a strictly legal point of view the wife risks absolutely nothing by unchastity. . . . She does not, in any case, forfeit her dower, and the criminal law will have nothing to say to her, but will have much to say to him, should he be provoked to take the law into his own hands. The framers of the Indian Penal Code showed, perhaps, less than their usual regard for logic, when they alleged the harshness of the native laws towards virtuous wives as a reason for according impunity to vicious ones.'

[2] It is, perhaps, needless to say that the law in either case has practically never been enforced. On the other hand, an unfaithful wife might well be made away with by her husband or brother, and similarly an unmarried daughter or sister might be punished by father or brother. It is worthy of note that amongst both Muslims and pagans the woman's relations are considered to be more disgraced than her husband by her conduct, and they would often be despised did they not inflict punishment on an incontinent relative. For the proof of the crime see p. 299, rule 1557.

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CHAPTER XLIV

SLANDER (*ḲADHF*)

Ibn-Arfa's definition: Whoever falsely accuses another of fornication, or who injuriously contests the status or the paternity of a Muslim, commits the crime of slander in its widest sense ;—in a more restricted sense, he who, being of age and responsible for his actions, falsely accuses of fornication a free person, of irreproachable conduct and of the Muslim faith, or who injuriously contests the paternity of a Muslim, is guilty of the crime of slander and punishable according to law.

Section I

Of the Nature of the Infraction

1964. WHOEVER wilfully attaints the consideration in which a free Muslim is held, by imputing to him the crime of fornication or by contesting his legitimate paternity, commits slander, if the person thus defamed is not a foundling.

1965. To make the crime punishable, the person who accuses another of having slandered him must be of age, innocent of any act of fornication, and legally presumed to be of legitimate birth, even though his paternity may have been disavowed.

Section II

Of the Punishment.

1967. A slanderer shall be punished with eighty lashes,[1] whether he has slandered one or many collectively ; a second offence after punishment for the first, will be punished with the same number of lashes.

1968. The punishment will be halved in the case of a slave.

1969. It is slander to say :—' I, I am not an adulterer,'—or, ' Your eye has sinned,' or, ' You were violated,' or, ' I, I am chaste and pure,' or, ' You are a *Rumi*,' or ' You are the son of your uncle,' or, ' You are a prostitute.'

1970. It is no slander to attribute to a person a nationality

[1] The punishment was established by the Prophet (Korân xxiv. 4) when his favourite wife, A'isha, was accused of improper intimacy with Ṣafwân b. al-Muʿaṭṭal al-Salami. (Hughes.)

other than his own, nor even to attribute to a white man a negro origin, unless one is talking to an Arab.

1971. It is slander to say to anyone that he is effeminate, if his bearing is not feminine; or to say:—'Son of a Christian,' or, 'Son of a fair race,' if there is nothing to justify such an epithet; or to say to a man that he is worn out or impotent, unless the slanderer makes oath and swears that he did not intend to convey any injurious meaning.

1972. A slanderer will only be punishable at the discretion of the judge when he has used expressions such as 'You son of a flighty, or immoral, mother'—'Ass'—'Son of an ass'—'I am a strict man'—'Drinker of wine.'

1973. The woman who answers back to the one who accuses her of adultery: 'Well, I committed it with you,' renders herself liable to the punishment both of adultery and slander.

Of the Prosecution

1974–1978. An action for slander may be begun by a son against his father, but his evidence may be challenged on the ground of impiety. The right to prosecute lies with any one who has been slandered, against his slanderer, even though he may know that he is guilty of the reproach that has been levelled against him. The right passes to the heirs, and may be exercised by them, when the memory of the deceased has been aspersed.

CHAPTER XLV

THEFT (*SARḲAH*)

Ibn-Arfa's definition: Every person, who is not a minor and is legally responsible for his actions, who fraudulently takes away a young child, who is incapable on account of youth of either knowing or understanding, or who takes away property, recognized as such in Law and belonging to another from the place where it is kept,[1] and carries it away clandestinely with the intention of appropriating it without there being any shadow of right to defend his actions commits the crime of theft, if the value of the thing thus stolen can be legally appreciated.[2]

Section I

Of the Punishment

1979. HE who is convicted of theft shall have his right hand cut off.[3] [4]

Section II

Of the Nature of Theft

[1] *Ḥirz* is the name given to any place where an object lies in safe custody. It signifies that condition of normal safety in which a child, an animal, or goods may be left; as for instance, the child in its parents' home, sheep in the fold or horses in the stable, or again goods in a shop. Whether the thief is liable to *ḥadd* or *taʿzîr* depends on whether the thing was stolen from *ḥirz* or not; in the latter case the crime is no longer *sarḳah* but *ikhtilâs* or *khulsah*.

[2] That is, it must amount in value to at least a quarter of a *dînâr* or three *dirham* (rule 1985). The *dînâr* was worth about 10*s*. (Hughes) or 10*s*. 4*d*. (*Tuhfat*, note 128), varying in different places and at different times; a *dirham* or *drachma* would thus be worth about 10½*d*. and the lowest value for which a *ḥadd* punishment can be inflicted is 2*s*. 7*d*. Cf., p. 44, note 2, and Lane, I. p. 134.

[3] Lane (I. p. 135) mentions that in Egypt early in the nineteenth century the punishment of amputation was not inflicted, beating and hard labour being substituted. Perron, writing at the same time, states (VI. p. 465) the same thing. Yet the punishment ordered in the Korân (Sura v.) was very frequently carried out in Nigeria and in Morocco up to the time of European domination.

[4] Then follow rules referring only to the manner and order in which limbs should be cut off for second and subsequent offences.

Sub-section 1. Of the thing stolen.

1984. Whoever furtively takes away a young child [1] from custody [2] commits theft and is liable to the punishment of amputation.

1985. Whoever furtively takes away from custody [2] an object worth at least a quarter of a *dînâr* or three *drachmae* or their lawful equivalent in any particular locality, is punishable for theft.

1987. The crime is punishable even when the thief thought he was taking brass instead of gold, or a garment without value instead of one that in reality contained money in its pockets.

1988. The crime is punishable even if the thief had a minor as an accomplice with whom he had shared the thing stolen; but not if he had for an accomplice an ascendant of the owner of the thing stolen.

1989. The taking away of a thing from custody is not deemed theft [3] (*a*) when the thing stolen is of use merely as an idle amusement, as, for example, a talking parrot; (*b*) when the total amount of the theft, stolen at different times during the night, amounts to three *drachmae* or more in value [4]; when the abstraction has been the work of several, though each could have by himself abstracted the total amount taken, if the value of the part that each has abstracted does not amount in value to the legal minimum of three *drachmae*.[5]

1990. Only the property of another can be stolen.[6]

1991. Even though the owner may disavow the ownership of the

[1] In Ḥanafi Law a free infant cannot be stolen, for there is no property in a free person. (Hughes.)

[2] Custody is of two kinds; first by place, e.g., a house or shop, and second by personal guard, which is by means of a personal watch over property. (Hughes.) Cf., p. 155 and p. 335, note 1.

[3] i.e., is not punishable with amputation, though the theft may be punished as a misdemeanour at the discretion of the judge.

[4] To understand this proviso it must be borne in mind that to constitute theft punishable by amputation, the thing stolen must have been abstracted furtively at one time and not on several successive occasions. Thus, if a man, intending to steal a small quantity of wheat, took but a little and then, finding that there was no chance of present discovery, went on taking more and more until he had stolen a total of at least 2/7 in value, his action would not amount to theft punishable by amputation. Yet (cf., Perron, VI. p. 61), according to certain jurists, if the intention of the thief had been to abstract at one time an object of taxable value, and he had actually only been able to take it away on several occasions, he would be liable to amputation.

[5] It is, of course, understood that the total value of the object stolen amounted to the legal minimum. If, on the other hand, the value of the share of each of the thieves amounts to the legal minimum, each is liable to amputation, even though only one actually abstracted the object stolen. Again, if the share of each does not amount to the legal minimum, but the value of the whole that is stolen does so amount, each of the accomplices is liable to amputation if they had all actually helped to take away the object stolen. (Perron, VI. pp. 61, 62.)

[6] By this is meant that if a thief steals what another has stolen, both are liable to amputation. Again, if an executor, a guardian or an agent steals that which has been entrusted to him, though he may have the right to dispose of it, and even though it may be in pawn or out on trust, he is liable to amputation. (Perron, VI. p. 64.) Cf., rule 1992.

thing stolen, the thief is liable to amputation.[1] Again, the thief is liable to the punishment even though he says that the owner of the object sent him to take it away during the night. Yet, in either case, the evidence of the owner or the accused is admissible if it seems to be probable.

1992. It is not theft when the owner of an object abstracts it from where he has pawned it or hired it out. It is also not deemed theft when the object abstracted has become the property of the abstractor without his knowing it and before the abstraction took place.

1993. There can only be theft when the thing stolen is among those in which property is guaranteed by the Law.

1994. Thus amputation is not applicable to one who has stolen wine or a musical instrument unless the intrinsic value of the wood alone amounts to three *drachmae* ;

1995. or to the theft of a dog, even of that of a dog used for hunting ; or of the meat of sacrifices, unless it had been already given in alms.

1996. There can only be theft when it is committed to the prejudice of the absolute owner by an individual having no sort of right over the thing stolen.

1997. Yet embezzlements committed to the prejudice of the State are thefts punishable by amputation [2] ; as also the theft of things by an associate from the common stock, if such stock was kept in a place over which he, by himself, had no control, and provided he stole to the value of three *drachmae* over and above his own share in the stock of the associates.[3]

1998. Abstractions committed by the grandfather, even the maternal grandfather, of the owner of the thing abstracted are not deemed theft ;—nor are those committed by a creditor to the prejudice of his debtor [4] when the latter has denied his obligation or has continually put off paying the debt.[5]

1999. The crime of theft punishable by amputation consists in abstracting something from the place where it is kept and where it

[1] Here it is understood that the thief has confessed his crime ; on his confession he is condemned, though the thing stolen remains with him so long as the owner does not claim it as his property. (Perron, VI. p. 63.)

[2] In Ḥanafi Law this is not the case, for public funds are considered to be the common property of Muslims in which the thief, as a member of the community, has a share. (Hughes.)

[3] Thus it appears that breach of trust under certain conditions is punishable by amputation, even though the crime does not fall within the definition of the major crime. In Ḥanafi Law, breach of trust, *ḳhiyânah*, is not punishable by amputation, cf., *Hidâyah*, II. pp. 93–102 ; but the subject requires elucidation.

[4] It is of no importance whether the thing taken by the creditor is of the same species as that which was owed him by the debtor. (Perron, VI. p. 68.)

[5] This is an important proviso and is very often urged in defence. The theft must first be proved and then the debt must be judicially proved. It is presumed that the creditor has not taken more than three *drachmae* beyond the amount of the debt.

is considered to be in safety; it does not matter, however, whether the thief actually entered the place or went out again after having entered.[1]

2000. Thus any one who commits any of the following crimes commits theft and is punishable by amputation: [2]

(*a*) He who abstracts a pearl and swallows it before leaving the place where it was kept.

(*b*) He who covers himself with a perfume that can afterwards be scraped off and sold for three *drachmae*.

(*c*) He who by signs or holding out a bait, attracts to himself a sheep from out of the fold.

(*d*) He who takes away a tombstone, or a tent, or that which was inside it.

(*e*) He who abstracts an object from a shop, or from a shop front, or from in front of a tent.

(*f*) He who appropriates an object loaded in a cart or from a pack, without there being any necessity for distinguishing as to whether the owner of the pack animal, the cart, the shop, or the tent, was absent or present.[3]

(*g*) He who appropriates grain or fruit lying on a threshing floor; or he who purloins any object whatever from the courtyard of a house where he is a stranger and into which he has not received permission to enter.

(*h*) He who steals on board ship.

(*i*) He who appropriates from a hostelry wherein is stored heavy merchandise.

(*j*) He or she who abstracts an object kept under lock and key to the prejudice of his or her husband or wife.

(*k*) He who steals a horse left standing with its attendant on the public highway for the purpose of being sold or any other motive.

(*l*) He who despoils a corpse lying in the tomb or a corpse that has been buried at sea.

[1] We have also seen in Ibn-'Arfa's definition that to constitute the crime of theft, i.e., the crime punishable by amputation, it must have been committed (*a*) clandestinely and (*b*) that the thief must have had no sort of right over the object stolen.

By (*a*) there is established a distinction between theft punishable by amputation and what may be termed forcible seizure, *ikhtilâs* or *khulsah*; for examples see rule 2001.

By (*b*) the case is excluded of a father stealing from his son, or a slave from his master (see rule 2004), or thefts committed by a minor or a lunatic.

Perron's translation (VI. p. 52) has it that to constitute theft the action must have been clandestine and completely illicit; the words 'completely illicit,' occurring instead of 'no sort of right over the object stolen' in Seignette's translation.

That the major crime cannot be committed when a slave steals from his master, is important.

[2] The given examples are illustrations of *ḥirz*, see p. 335, note 1.

[3] For the law presumes that objects so situated are in custody; see rule 1985.

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(*m*) He who steals a boat at anchor.

(*n*) He who steals anything whatever in the presence of its guardian.[1]

(*o*) He who steals grain [2] from a silo, provided the silo is situated near the house of the owner.

(*p*) He who steals a camel or any head of cattle from the herd.

(*q*) He who unhinges the door of a mosque, or takes away the chandeliers, mats or carpets that belong to the mosque.[3]

(*r*) He who steals from the public baths.

(*s*) He who takes away a slave unable to discriminate or entices him or her away by trickery or seduction.

(*t*) He who steals from a public place [4] where all have the right to enter, if the thief came out with the object stolen. But if to enter, the thief had to have special permission, e.g., a personal invitation,[5] and had stolen an object from a place shut to him and had taken it out of the house, still he would not be liable to punishment by amputation.[6]

2001. He who commits any of the following acts is not guilty of theft punishable by amputation :[7]

(*a*) He who merely displaces some object in custody without taking it away.[8]

(*b*) He who takes from a child an object that was being carried or that the child was keeping.[9]

(*c*) He who, being outside, receives an object stolen by another in the interior.[10]

(*d*) He who profits by the inattention of those about to steal adroitly.

(*e*) The manifest thief who openly steals that which is not his from the spot where it is lying and runs away with it whilst the owner goes off to call witnesses.

[1] It does not matter whether the guardian is asleep or not, for he is the *ḥirz* or place of custody and surety of the object. (Perron, VI. p. 72.)

[2] Or any other food-stuffs. (Perron, VI. p. 92.)

[3] The crime includes any act of sacrilege, whether there has been actual theft or not (cf., Perron, VI. p. 77).

[4] e.g., the house of a judge, a doctor or a professor. (Perron, VI. p. 79.)

[5] The theft in this case is considered but a betrayal of hospitality. Special permission to enter is held to include the case of a traveller being received as a guest or the case of a man being sent by the owner of the house to fetch something. (Perron, VI. p. 80.)

[6] In all these cases the thing stolen must have been worth at least three *dirham*.

[7] See p. 338, note 1. The Law does not consider the unlawful acts enumerated in this rule as *sarḳah* but as filching, receiving or openly carrying off, the thing stolen not being in proper *ḥirz* (p. 335, note 1). They are, of course, liable to *taʿzîr*.

[8] To constitute the major offence of *sarḳah*, the thing must have been actually taken away from its *ḥirz*.

[9] A thing is not in *ḥirz* when in the possession of a child.

[10] This is important since in English law we should consider the two accomplices as equally guilty.

(*f*) He who steals a horse left standing without an attendant at the door of a mosque or in a market place.

(*g*) He who appropriates any article of clothing left hanging in part over a public road.[1]

(*h*) He who steals food-stuffs still in the ground [2] unless within an enclosure. Or he who steals food-stuffs left on the ground and not yet disposed in heaps, ricks or sheafs. However, there are several different theories as to this.

2002. The mere fact of piercing [3] a wall in order to steal does not constitute the major offence; but when he who has pierced the wall and he who has got in through the hole pass each to the other the object stolen, both are guilty of the major offence, even if the thief outside pulled out the object stolen by means of a rope.[4]

Sub-section 2. Of the responsibility of an agent.

2003. The essential conditions of a charge of theft are, (*a*) the puberty of the accused, (*b*) his sanity.[5]

2004. The guilty party will suffer amputation, whether he has stolen from one of the same status as himself or not; but not so if the theft has been committed by a slave to the prejudice of his master.[6]

Sub-section 3. Of the proof of a charge.

2005. Other than by ordinary judicial proof,[7] a charge may be established by a confession, if such confession was spontaneous and voluntary.

2006. Non-spontaneous confessions do not constitute proof of guilt.

2007. Even if the object of the charge be found on the person of the accused, proof of his guilt is not thereby constituted. The same rule applies in the matter of murder with regard to the confrontation of the accused with the corpse of the victim.[8]

[1] In this case the wall of the house or courtyard is the *ḥirz*. If a pair of trousers was left hanging over the public side of the wall, it is not considered to be in custody.

[2] Or fruit still on the tree. (Perron, VI. p. 82.)

[3] i.e., forcible entry, *nakb*. (Perron, VI. p. 83.)

[4] In every case it must be remembered that to constitute the major offence of theft the object stolen must be of the value of at least three *drachmae*.

[5] Neither sex nor position matters; nor does his status as a freeman or slave, Muslim or Infidel. (Perron, VI. p. 84.)

[6] See p. 338, note 1. The same rule applies when a slave steals from another of his master's servants an object worth more than three *drachmae*. The Law reasons that the master should not be compelled to suffer two causes of damage, the loss of the property stolen and the deterioration in the value of his slave by reason of the amputation of one of his hands. By slave is here understood every category of slave. (Perron, VI. p. 86.)

[7] i.e., two male witnesses, or one male and two female witnesses.

[8] This rule does not appear to mean more than that the French method of confrontation, in order to extract a confession of guilt, is of no value in Muhammadan Law. The charge must be proved by judicial evidence or spontaneous

2008. A confession may always be retracted even if originally made with every appearance of sincerity.

2009. When the proof of theft is constituted by proffering the oath to the plaintiff, or by the evidence of one man and two women or of one witness alone supported by the plaintiff's oath, or by an admission on the part of the master of an accused slave, a sentence of amputation cannot be pronounced; the accused is only liable to pay compensation. Inversely, when the slave confesses his guilt and his master denies it, a sentence of amputation must be pronounced, but without awarding compensation.

Sub-section 4. Of the surrender of the thing stolen.

2010. The surrender of the thing stolen is always obligatory when the guilty party does not suffer amputation.[1] When, on the other hand, the guilty party is sentenced to suffer amputation, he will not further be liable to pay compensation, unless at the moment of suffering his punishment he is well known to be solvable; should he only become solvable at a later date no action for compensation will lie against him.

Sub-section 5. Prescription of punishment.

2012. Prosecution for the crime of theft and the infliction of the punishment is not prescribed by any lapse of time, not even through the repentance and subsequent good conduct of the thief.[2]

Sub-section 6. Of conviction on several charges.

2013. In the case of conviction on several charges of the same nature or liable to the same punishment, as, for instance, in a conviction for slander[3] and wine drinking,[4] the sentences are not cumulative but the heaviest only is pronounced.

and voluntary confession not brought about by any act of the prosecution. But this rule as to voluntary confessions has only reference to the sentence, for it is distinctly laid down in the *Tuḥfat*, rule 1540, that a suspected thief may be imprisoned and flogged or bastinadoed in order to make him confess. The sentence would not then be one of amputation but of restitution or compensation. The same procedure may be applied in the case of an accused whose reputation is not known. (*Tuḥfat*, note 1407.) From note 1406 (*Tuḥfat*) it would appear that an 'honourable person' cannot be preventively imprisoned nor even prosecuted for theft; the prosecutor may even suffer light correction for his audacity.

[1] The object itself must, whenever possible, be surrendered, and not its money value. The plaintiff may recover from the debtors of the guilty party in proportion to the amount of their several debts. (Perron, VI. p. 89; *Tuḥfat*, note 1412).

[2] There is no blame in asking for the pardon of a thief, but if he is a known thief he must not be interceded for. (Perron, VI. p. 90.)

[3] See Chapter XLIV, p. 333.

[4] See Chapter XLVII, p. 347.

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CHAPTER XLVI

BRIGANDAGE OR HIGHWAY ROBBERY (*KHIRÂBAH*)

SECTION I

THE NATURE OF THE CRIME

2014. THE brigand is he who, either acting singly or in concert with others, haunts the highways in order to waylay travellers, or who profits by the fact that his victims are far from help [1] and openly seizes them or their goods.[2] There is no call to distinguish between attacks made on Muslims or Infidels or on the inhabitants of any particular town or any other.

2015. The crime of brigandage is also held to include: (*a*) he who employs a narcotic in order to rob; (*b*) he who entices into an ambush a child or an adult in order to murder or rob him; (*c*) he who by day or night, in an inhabited house or in a street, murders or uses violence in order to steal.

SECTION II

OF PUNISHMENT

2016. If at all possible the brigand must be adjured to desist,[3] after which he may be fought, captured and crucified,[4] if he is a slave. If he is a free man he may be deported, as for the crime of fornication, or his right hand and left foot may be amputated, and this without reprieve.[5]

2017. If there be complete judicial proof of murder or complicity in murder, even of an Infidel, the brigand will be condemned to death,

[1] If help were near, the assailant would not be considered a brigand but a usurper, even were he a sultan. (Perron, VI. p. 92.)

[2] The legal minimum (rule 1985) does not apply in the case of brigandage. (Perron, VI. p. 92.)

[3] 'In the name of God, I adjure you to desist,' repeated three times. (Perron, VI. p. 94.)

[4] By crucifixion is meant impalement, a punishment once common in Turkey, Persia and Egypt.

[5] As late as 1890, in the semi-elective Legislative Council of Egypt, all the non-official members voted in favour of an amendment to a Government Bill to the effect that, in accordance with the religious law, such a sentence of impalement and (or) crucifixion should be reintroduced for the more effectual punishment of brigandage. (Milner, *England in Egypt*, p. 581.)

even though he may have given himself up and has shown repentance.

2018. The nearest agnate of the deceased has no right of pardon in the case of a brigand.

2019. The Law counsels a sentence of death in the case of a clever and dangerous brigand; of amputation, when he is to be feared on account of his physical strength; of deportation after flogging, when he is not robust and has set about the robbery without preconceived plan; but it is the prerogative of the sovereign to decide as to the sentence.

Section III

Of Compensation

2020. A brigand is held jointly and severally responsible with his accomplices in the matter of restitution and compensation.

2021. The same rules apply as in the case of theft.[1]

2022. Stolen objects will be restored to their owners after the taking of the oath and after the delays fixed by the Law in the case of lost property, or without delay or oath if the owner produces two witnesses from among the travellers who were with him at the time of the robbery. But no such witness can give evidence on his own behalf.

Section IV

Of Proof

2023. The evidence of two witnesses certifying as to the identity of a brigand already notorious for his crimes, is sufficient to establish his guilt, even though they are unable to give any evidence on any particular charge.

2024. In the case of a brigand who has given himself up or who has renounced his former occupation, the special punishment provided for this crime will not be applied.[2] [3]

[1] See rule 2010.

[2] For if he has ceased to rob, there is no longer any utility in putting him to death, the only aim of the Law being to safeguard all without distinction. (Perron, VI. p. 101.)

[3] The *amân*, or protection, should never be accorded to a brigand. (Perron, VI. p. 101.)

CHAPTER XLVII

LIQUOR PROHIBITION (*SHARB*) [1]

Section I

Of the Nature of the Offence

2025. EVERY adult Muslim, legally responsible for his actions, who wilfully and without excuse, or necessity, or the pleading of error on his part as to the nature of what he drank, yet drinks any intoxicating liquor, even a small quantity insufficient to produce intoxication, is guilty of the crime of drink, provided for and punishable by Law.[2]

2026. To plead ignorance of the Law or of the punishment on account of recent conversion to Islâm is no excuse. Nor is it any excuse in an Hanafite to plead that some jurists of his School tolerate the drinking of wine made from raisins.

Section II

Of the Punishment

2027. He who has been convicted of drink, will be condemned to suffer eighty lashes, inflicted after he has recovered from his drunkenness.[3]

2028. The punishment is halved in the case of a slave.[4]

Section III

Of the Proof of the Charge

2029 Guilt may be established by the confession of the accused or by the testimony of two witnesses who saw him drink or who had

[1] The Koranic prohibition is found in Suras ii. 216 ; v. 92.

Sharah literally means 'that which is drunk.' The term is only applied to intoxicating drinks. (Hughes, p. 572.)

[2] According to a commentator, drunkenness is more dangerous and harmful in its social consequences than even adultery or fornication. Drunkenness is the mother of all vices ; too often it leads to adultery, to theft, and to murder, and moreover, it is so common in the world. (Perron, VI. p. 104.)

[3] If the punishment has been inflicted whilst the recipient was still under the influence of drink, it must be repeated on his becoming sober, for the first flogging was without result, seeing that it could not be felt. (Perron, VI. p. 104.)

[4] The eighty and forty lashes are *ḥadd* punishments.

smelt the liquor, though one witness may have seen and the other smelt.

2030. The crime is only excusable if the accused had been constrained by violence to drink, or by some great necessity, such as the danger of choking, no water being handy.

2031. It is unlawful to use wine as a medicine,[1] even for external application.

Appendix

Of Punishments in Criminal and Correctional Cases

2032. The punishment of flogging will be inflicted by means of a special whip [2] and with moderate force.[3] The lashes [4] must fall on the back and shoulders of the criminal who must be in a sitting [5] posture and not bound,[6] and his hands must be free.[7] [8]

[1] When in danger of dying, a Muslim may take wine as medicine, but should he get drunk, he will be liable to the prescribed punishment. But God has put no medicinal virtue into wine. (Perron, VI. p. 106.)

[2] The whip must be of supple leather, with one tail only.

[3] The strokes must be measured ones, neither violent nor gentle.

[4] The whip or lash is held in the hand by the three last fingers, the first finger is brought down on to the palm of the hand and the thumb on to the first finger ; the right foot is brought forward. (Perron, VI. pp. 106 and 107.)

Under these circumstances it will be realised what a moderate punishment eighty lashes must be. The Law as to the method of holding the lash is generally complied with in Northern Nigeria.

[5] Perron's translation has it standing, not sitting.

[6] The culprit may only be bound if his movements interfere with the proper carrying out of the flogging. (Perron, VI. p. 107.)

[7] Back and shoulders must be bare. (Perron, VI. p. 107.)

[8] Women may be flogged, but should be placed in a large basket in such a manner as her person shall not be seen. (Perron, VI. p. 107.)

These instructions as to flogging apply both to *ḥadd* and *ta'zîr* sentences.

CHAPTER XLVIII [1]

CORRECTIONAL PUNISHMENT (*TA'ZÎR*) LIABILITY FOR TORTS RIGHT OF DEFENCE

SECTION I

CORRECTIONAL PUNISHMENTS [2]

2033. CORRECTIONAL punishments are those which the Law leaves to the discretionary power of the Ḳâḍi [3] with which he may punish all other crimes,[4] whether committed against the commandments of God [5] or against one's neighbour.[6] These punishments [7] are: imprisonment,[8] admonition,[9] standing upright in

[1] In the Arabic text and Seignette's translation, this chapter is included in the appendix to the preceding chapter.

[2] '*Taʿzîr* may be inflicted for offences against human life and body, property, public peace and tranquillity, decency, morals, religion and so on; in fact the entire criminal law of the Muhammadans as prevalent at the present day is based on the principle of *taʿzîr*.' (Abdur Rahim, p. 363.)

[3] 'He is to take into account in awarding punishment, the nature of the offence and the circumstances under which it was committed, the previous character and the position in life of the offender.' (Idem.)

[4] i.e., other than *ḥadd*.

[5] e.g., breaking the fast of *Ramadhân*. (Perron, VI. p. 109.)

[6] e.g., assaults, invectives. Duty towards God consists in imprescriptible duties which no man has the right to abrogate or to change. Duty towards one's neighbour is modifiable and variable, even though it has value in the eyes of God. (Perron, VI. p. 109.)

[7] Chastisements might be a better term in order to accentuate the difference between punishments that are *ḥadd* and those that are *taʿzîr*.

'*Taʿzir*, in its primitive sense, means "prohibition," and also "instruction"; in Law it signifies an infliction undetermined in its degree by the Law, on account of the right either of God, or of the individual; and the occasion of it is any offence for which *ḥadd*, or "stated punishment," has not been appointed, whether that offence consists in word or deed.' . . . . 'It is also written in the *Fatâwa-i-Timûr-Tâshi* of Imâm Sirukhsh, that in *taʿzîr* nothing is fixed or determined, but that the degree of it is left to the discretion of the Ḳâḍi, because the design of it is correction, and the dispositions of men with respect to it are different, some being sufficiently corrected by reprimands, whilst others, more obstinate, require confinement, and even blows.' (Hughes.)

[8] According to the *Fatâwa-i-Shâfiʿi* imprisonment is only applicable to the middle and lowest order in the community. It may be combined with flogging. (Idem.)

[9] According to the *Fatâwa-i-Shâfiʿi*, admonition is applicable to the most noble of the noble (i.e. princes and men of learning), also to the noble (i.e., chiefs of districts). The form of the Ḳâḍi's admonition might be, 'I understand that you have done thus, and thus,' so as to make him ashamed. (Hughes.)

an assembly, the taking away of the turban, and flogging by means of a whip or other instrument.[1]

2034. Correctional punishments may be more severe than stated punishments, and the Judge is not liable on account of death or permanent injuries by reason of the correctional punishment ordered by him to be inflicted, unless he caused such death or injury intentionally.

Section II

Of Responsibility for Torts

2036. A doctor will be held pecuniarily responsible for any injury that he may have caused either through ignorance or through neglecting the precepts of his art.

2037. A doctor will further be held pecuniarily responsible should he treat a sick man without previously having been asked to do so, either by the man himself or his master if he is a slave; and this rule applies even if a slave had asked the doctor to bleed or cup him or to circumcise him.

2038. In the same manner pecuniary responsibility rests on:—

(*a*) him who should light a fire during a high wind, thereby causing damage to another;

(*b*) him who neglects to repair his wall after having been warned to do so, should the wall then fall down and cause any damage to another;

(*c*) him who, by quickly pulling away his hand, pulls out the teeth of another who was biting him;

(*d*) him who throws a stone at another who was indiscreetly looking at him through a window, and hits the peeping one in the face. However, if the latter was hit without aim having been taken, no responsibility lies on the thrower of the stone.

2039. There is no reparation due when persons or things have been accidentally injured, as, for example, by the fall of a rain pipe, or by a fire that has been fanned by a sudden wind, or by a fire that has caused the death of one trying to put it out.

Section III

Of Cases of Lawful Defence

2040. There is neither crime nor misdemeanour in using force to defend oneself [2] or one's property against an aggressor; the latter

[1] It is noteworthy that the punishment by fining is nowhere mentioned in the *Mukhtaṣar*, nor in the *Tuḥfat*, nor *Minhâj*.

It is recorded of Abu-Yûsuf (a disciple of Abu Ḥanîfa) that the ruler of a country may exact a small sum in the manner of a fine, proportioned to the offence; but this doctrine is rejected by many of the learned. (Hughes.) For Abu-Yûsuf, see p. 6, note 8.

[2] Including wife, family and kinsmen. (Perron, VI. p. 113.)

should, however, be adjured to desist [1] if he is in a state to understand the appeal.

2041. Killing in such a case is permissible if no other means will cause the aggressor to desist; but if flight from him can be taken without exposing oneself (or one's goods) to injury, the Law does not even permit the wounding of the aggressor.[2]

Section IV

Of Damage Done to the Fields

2042. Owners are responsible for damage caused by their cattle [3] to the fields of others during the night, even though the value of the damage done is greater than that of the animals that did it.[4] Estimation of the damage will be made, bearing in mind the chances of a good or bad crop.[5]

2043. If the damage was caused during the day, the owner of the cattle will not be held responsible if his animals were put out to pasture far from the cultivated fields and with no one to look after them.

2044. If, on the other hand, the cattle were in charge of a herdsman, he will be held responsible.[6] [7]

[1] See rule 2016.

[2] 'The principle on which the right of self-defence is based is that, when a man takes up arms against another, he loses the protection of the law. . . . If the person threatened can have recourse to the assistance of the law in time to prevent the harm, he cannot take the law into his own hands.' (Abdur Rahim, p. 351.)

[3] Any domestic animal is intended except pigeons and bees. (Perron, VI. p. 115.)

[4] The animals themselves can never be given in compensation as a slave can be, for it cannot be held that culpability rests with them. (Idem.)

[5] If, before the Court pronounces its decision, all traces of the damage have disappeared through the operation of nature, the owner of the cattle is only liable to a correctional punishment. See rule 2033. (Idem.)

[6] Unless he was unable to stop the cattle committing the depredation. (Idem.)

[7] *Employers' Liability.* If a labourer, whilst digging a well or working in a mine, gets killed, the employer is not liable if the latter was within his rights in undertaking the work that was the cause of the death of his labourer. (Perron, VI. p. 118.)

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CHAPTER XLIX[1]

UNCONDITIONAL ENFRANCHISEMENT (*ATÂḲ*)[2]

SECTION I

DEFINITION. CONDITIONS ESSENTIAL TO THE VALIDITY OF THE ENFRANCHISEMENT

Sub-section 1.

ENFRANCHISEMENT is the renunciation of the right of property over a living person, when that right is a lawful one and has not been acquired by means of an illegal capture. Thus there can be no real right of property over a Muhammadan who has been captured,[3] and to buy his freedom from the enemies of Islâm is not to enfranchise him.[4]

Sub-section 2.

Minors and lunatics can only enfranchise with the consent of their tutors; the same rule as applies in the case of a sale. A debtor also cannot enfranchise his slave.

SECTION II

OF THOSE FORMULAS OR WORDS[5] WHICH EITHER BY THEMSELVES OR ACCOMPANIED BY CERTAIN ACTIONS OR CERTAIN CIRCUMSTANCES ESTABLISH THE FACT OF ENFRANCHISEMENT OR MANUMISSION.[6]

[1] Chapters XLIX to LIII are taken from Perron, as they are not included in Seignette's translation.

[2] The enfranchisement of slaves is permitted under the following forms:—

(*a*) *Atâḳ*, lit. power. Emancipation without conditions.
(*b*) *Tadbîr*, see Chapter L, p. 351.
(*c*) *Kitâbah*, see Chapter LI, p. 361.
(*d*) *Istîlâd*, see Chapter LII, p. 367.

Of these different forms of enfranchisement, the first is the normal one and the one which the Law commends. But as is always the case, Muhammadan Law takes human nature into great consideration and provides accordingly. Cf., Section VI. p. 353.

[3] Bosword Smith in his *Mohammed and Mohammedanism*, p. 206, says that a captive who embraced Islâm should be *ipso facto* free, but this is not the teaching of the *Hidâyah*: 'If captives become Muslims, let not the Imâm put them to death . . . but yet he may lawfully make them slaves, after their conversion. . .' (Hughes, p. 597). Nowhere in the law books of the Mâliki School is it to be found that a captive who embraces Islâm becomes *ipso facto* free.

[4] See p. 85.

[5] Khalîl and his commentators go at length into this question which, however, does not appear to be one that calls for our attention.

[6] Very special blessings are attached to the emancipation of a slave. A

Section III

Of the enfranchisement of Slaves who are also Relations of the Master

Should a person become the master of his father or mother, of his child, or other descendant, of his brother or sister whether consanguinean or uterine ; such slaves acquire their freedom by the mere fact of their coming into ownership. Either the master or the slave, however, must be a Muhammadan. Nephews and nieces, uncles and aunts do not necessarily acquire their freedom under such circumstances.

Section IV

Of the Judicial Enfranchisement of Slaves on account of Bad Treatment

The judicial authority may decree the enfranchisement of a slave, to the detriment of his master, whenever the latter has intentionally done anything to his slave which, in the eyes of the world, would be considered degrading or humiliating.[1] It matters not whether the master intended to cause physical [2] or moral suffering.[3]

Section V

Of those Acts of Violence which entail Judicial enfranchisement

Judicial enfranchisement is decreed whenever a master has pulled out the nails of his slave, or has cut off a part of his ear or has cut off any other part of the body (partial or complete emasculation [4] is thus included) ; or has pulled out one or more of his teeth.

A slave is also set free by judicial authority if his master has

tradition runs : Whosoever frees a slave who is a Muslim, God will redeem every member of his body limb for limb, from hell fire. And another *Hadith* says : Free a slave, or assist one in redeeming a bond of slavery. (Hughes, p. 597.)

[1] The enfranchisement of a slave whom his master has ill-treated to the point of disfiguring him, is to be decreed. (*Tuḥfat*, rule 1314.) The judge is to intervene in such a case and oblige the master to enfranchise his slave. (*Tuḥfat*, note 1231).

[2] A saying of Muhammad runs : He who beats his slave without fault, or slaps him on the face, his atonement for this is freeing him. On the other hand, the power of a Muhammadan owner over his slave is unlimited. The *Hidâyah* (iv., p. 282) says : A master is not slain for the murder of his slave. See Hughes, p. 599, and Lane, I. p. 127 ; cf., also Exodus xxi. 21. For the *ta'zîr* punishment to be inflicted on the master see p. 317, rule 1851.

[3] The example of moral suffering that is given is the cutting off of the hair of a beautiful female slave.

[4] Muḥammad strictly forbade his followers to make themselves eunuchs, or to make others. 'Uthmân b. Maz'ûn came to him and said : O Prophet ! permit me to become a eunuch. But Muḥammad said : He is not of my people who makes another a eunuch or becomes one himself. The manner in which my people become eunuchs is to exercise fasting. (Hughes, p. 110.)

marked him on the face with a hot iron, but not if elsewhere than on the face. But if the marking has been caused by a needle or otherwise than by fire the Law does not lay down whether enfranchisement should follow or not. Two contrary opinions have been put forward by jurists: one, negative, holds that all such markings must have been made with the object of beautifying the slave; the other, affirmative, holds that such markings must have been made to punish or at any rate with intent to vex.[1]

Section VI

Of issues between Master and Slave with respect to acts of Cruelty and Enfranchisement

The pleading of a master who swears that his ill-treatment of his slave was not intentional or premeditated, but the result of an involuntary action, is always accepted. When the master is known to be a violent and brutal man, neither his nor his slave's pleadings are admitted, but the latter is enfranchised by the Court.

The declaration of a master, even when made on oath, is rejected, if he pleads that he freed his slave for some consideration and the slave pleads that it was gratuitous. The pleadings of the slave are alone admitted, for the reason that the pleadings of the two parties prove the fact of enfranchisement and that, as a general principle, enfranchisement is gratuitous. Here it is understood that neither party has any proofs to bring forward.

Section VII

Of Partial Enfranchisement [2]

Section VIII

Of the Enfranchisement of a Slave before his or her Birth: of that of a pregnant Slave

A slave may be sold together with her unborn child to satisfy her master's creditors, even though the master has enfranchised the slave child when still unborn.[3] If, however, the enfranchisement was declared before ever the debt was contracted, then the mother only is liable to be sold and her child is free; but mother and child are not to be separated.

Section IX

Of Enfranchisement by a Guardian in the name of his Pupil

[1] Compare the known objection to vaccination as being a mark of slaverv similar to that employed by Rabeh during his conquest of Bornu.

[2] The case of the enfranchisement of a slave owned by two or more masters seems too recondite a matter to need setting forth.

[3] The context of the whole Section makes it appear that the child in this case is not the master's.

SECTION X

OF FREEDOM BOUGHT AT THE SLAVE'S OWN EXPENSE[1]

There are three cases to be considered when a slave hands his value to a third person in order that the latter may buy his freedom.

(*a*) The slave has said to the intermediary, 'Buy me for yourself'; in this case the sale, once contracted, is irrevocable, and if the buyer has not touched the sum handed him by the slave and has concluded the sale in his own name and as on his behalf, he cannot be proceeded against by the vendor. If, on the other hand, the intermediary has paid for the slave with the money handed him for the purpose by the slave himself, he must pay over a second time the price of the sale, for in reality the intermediary has, in the first instance, bought the slave with monies the property of the vendor, seeing that a slave's *peculium*[2] does not remain with him on his sale as it does in the case of his enfranchisement.

(*b*) The slave has said to the intermediary 'Buy me in order to free me.' In this case, the circumstances are the same as in (*a*). In both cases the slave is free and cannot be proceeded against by the intermediary in order to recover his price, which may have been paid to the vendor a second time. But in both cases, the slave may be sold if the intermediary is insolvent and cannot pay a second time the price of the slave.

(*c*) The slave, when handing over to the intermediary his sale price, has said, 'Buy me on my own behalf'; then, in this case, if the intermediary has paid the price with his own money and not the slave's, the latter is free, but the rights of a patron[3] rest with his former master and not with the buyer or the slave himself; for a slave cannot be his own patron and, on the other hand, the buyer has bought not on his own behalf but on the slave's.

SECTION XI

OF THOSE CASES OF ENFRANCHISEMENT WHEREIN THE SLAVES TO BE FREED ARE CHOSEN BY LOT[4]

[1] This Section does not appear to fall properly under *ʿatâḳ* enfranchisement which is immediate and unconditional, nor yet under *kitâbah* which implies a term during which the slave is *mukâtib*. The difference between this form of enfranchisement and the *ḳiṭâʿah* form (p. 365) is that, in the former, an agent is employed to purchase the would-be freed slave, whilst in the latter, the proposal emanates from the master.

[2] The Roman law term is used to designate the private property of a slave which he has acquired with his master's permission.

[3] See p. 369.

[4] A person cannot verbally, when in his last illness, or by will, enfranchise all his slaves, for they form part of his estate of which he can only dispose to the extent of one-third. If, then, the testator has enfranchised all his slaves, those forming the disposable third of his estate must be chosen by lot. The Section contains minute instructions as to how the lottery is to be carried out.

Section XII

Of the Enfranchisement of a Slave who is his Master's Creditor

The principle is that a slave's *peculium* remains with him on his enfranchisement, if the master has made no express stipulation to the contrary.

Section XIII

Of issues relating to the Fact of Enfranchisement

When a person makes oath and swears that another who pretends to be free is in fact his slave, and produces a witness to that effect, his evidence is accepted and the pretended free man becomes his slave. If, however, the master refuses to take the oath and the slave swears that he is free, his freedom is established ; but not if he refuses to take the oath.

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CHAPTER L[1]

POSTHUMOUS ENFRANCHISEMENT (*TADBÎR*)[2]

SECTION I

DEFINITION. OF THE USE OF WORDS THAT ARE NOT PRECISE

POSTHUMOUS[3] enfranchisement is that which only comes into operation on the death of the master or other person designated by him. A woman even may posthumously enfranchise her slave if his value is not greater than the disposable third of her estate.[4]

SECTION II

OF POSTHUMOUS ENFRANCHISEMENT BY A CHRISTIAN OR A JEW

Posthumous enfranchisement granted by a Christian or a Jew to his Muhammadan slave is irrevocable and the rights of patronage belong to the Muhammadans and not to the Christian or Jewish heirs.

SECTION III

OF ENFRANCHISEMENT WITH RESPECT TO THE CHILDREN OF *Mudabbir*[5] SLAVES

Posthumous enfranchisement includes the enfranchisement of

[1] From Perron's *Mukhtasar*, Vol. VI. p. 162.

[2] *Tadbîr* signifies literally 'plan,' 'disposition,' 'arrangement,' but in the language of the law it means a declaration of freedom made to a slave (male or female) to take effect after the master's death. If the owner of a slave say, 'Thou art free at my death,' or 'Thou art *mudabbir*,' or words to that effect, the slave can claim his freedom upon the decease of his master, and any children born to him in the interval are placed in the same position. (Hughes, p. 598.)

[3] Houdas in his translation of the *Tuhfat* calls this form of enfranchisement 'testamentary,' whilst Perron calls it 'posthumous' or *orsinien*, from the Latin word *orsa*, an undertaking. Posthumous enfranchisement differs from natural enfranchisement in that it is revocable, and that the value of the *mudabbir* slave must fall within the disposable third of the estate. See pp. 358, 368.

[4] From this it would seem that only in the case of a mistress must the value of the *mudabbir* slave fall within the third of her estate and this agrees with the well established rule that a man whilst living, but not in his last illness, may alienate the whole of his possessions, whilst a woman may only alienate a third (Zeys, II. p. 216) : but on the other hand, see Section v. p. 358, where it distinctly appears that for the enfranchisement to be effective, the value of the *mudabbir* slave must fall within the disposable third of the estate, whether the master was a man or woman.

[5] See note 2, *supra*.

children that the male or female slave may have from the date of the declaration. Provided that, in the case of a male slave posthumously enfranchised, his children are born of a female slave actually belonging to him. The enfranchisement of such children again depends upon whether the value of father and children falls within the amount of the disposable third [1] of the master's estate.

Section IV

Of the Status of the *Mudabbir* Slave with reference to the Master

The master has the right to retain as his concubine the slave whom he has posthumously enfranchised; to take from such a *mudabbir* slave his *peculium* and to pawn or mortgage him, but not to sell him or to give him away as a gift or in alms.

Section V

Of the Valuation of a *Mudabbir* Slave on the Death of his Master

The *peculium* of a *mudabbir* slave remains in his absolute possession, unless his master expressly stipulates to the contrary, but he himself only receives his freedom if his value falls within the amount of the disposable third of the master's estate. Thus, for example, if the slave is worth one hundred pieces, his *peculium* another hundred, and the master himself has left four hundred pieces, the total value of the estate is six hundred pieces and the slave receives his freedom. If, however, the master had only left one hundred pieces, only one half of the slave becomes enfranchised, and he retains his *peculium*; for the disposable third in this case only amounts to one hundred pieces or one half of the total value of the slave and his *peculium*. Again, one half of the slave only would be enfranchised if he himself had been worth two hundred pieces and the remainder of the estate had only amounted to one hundred pieces. In this case the slave is supposed to have no *peculium* whatever.

Section VI

Of the case in which among the Assets of the estate of the Master of a *Mudabbir* Slave there are bills whose payment is not yet due

Section VII

Of Enfranchisement which though Posthumous takes effect from a date anterior to the Master's Death [2]

[1] A man may not by will dispose of more than a third of his estate; this is the meaning of 'disposable third.' (*Risâlah*, note 62.)

[2] The section considers those far-fetched and casuistical developments in which the Muhammadan lawyer delights.

Section VIII

Of the Case of Posthumous Enfranchisement becoming null and void on the Death of the Master

Posthumous enfranchisement does not take effect if:—(*a*) the *mudabbir* slave murders his master; or (*b*) if the debts of the master, a first charge on the estate, absorb the whole of it including the value of the slave; or (*c*) if the value of the *mudabbir* slave does not fall within the disposable third of the estate. In this case the slave is partially enfranchised to the extent of one-third of the whole estate; but if the master's estate consists of the *mudabbir* slave only, his enfranchisement is null and void.[1]

Section IX

Of the Civil Status of the *Mudabbir* Slave

The *mudabbir* slave has exactly the same civil status as any other slave.[2]

Section X

Of Posthumous Enfranchisement to take effect on the Death of the Master and of a third person

[1] 'In matters of inheritance the order of preference is (*a*) funeral expenses (*b*) debts of the deceased; (*c*) legacies (*wasiyyah*); (*d*) the succession [distributable among the heirs.' (*Risâlah*, rule 221.) *Tadbîr* enfranchisement falls under (*c*) and these can only 'be paid out of the disposable third of the deceased's estate; if they exceed the third, the excess is to be rejected, unless the heirs ratify it.' (*Risâlah*, rule 160.) See also p. 357, note 4, and Sect. v. p. 358.

[2] But he cannot be sold or given away, see Sect. iv. p. 358.

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CHAPTER LI [1]

CONTRACTUAL ENFRANCHISEMENT (*KITÂBAH*) [2]

SECTION I

OF THE NATURE OF CONTRACTUAL ENFRANCHISEMENT

CONTRACTUAL enfranchisement is that form of emancipation under which a slave enters into an agreement (*kitâbah*) with his master to ransom himself at some future period, his enfranchisement only coming into operation when the last instalment of the ransom has been paid.[3]

From this it will result that there is no case of contractual enfranchisement when the agreement is one for the ransom to be paid down in full at the time of the agreement,[4] or when the ransom is to be paid by a third party,[5] or when the agreement is one in which enfranchisement is granted at once and without consideration.[6]

It is a moral obligation, and consequently meritorious, for every pious and generous person to grant contractual enfranchisement to his slave who solicits it.

It is further a meritorious act on the part of the master to grant the remission of the last instalment of the ransom.

The master cannot oblige his slave to accept an agreement of contractual enfranchisement. However, the *Mudawwanah* would appear to indicate that a slave can be obliged to accept such an agreement provided the ransom fixed is not greater in amount than what the slave can earn.

[1] From Perron's *Mukhtaṣar*, Vol. VI. p. 182.

[2] *Kitâbah*, literally, 'a writing,' signifies a bond of freedom granted to a slave (male or female) in return for money paid. It is founded on the teaching of the Korân, sura xxiv., 'And such of those as your right hands possess as crave "a writing," write it out for them if ye know any good in them,' which precept is held to be recommendatory, although not injunctive. The slave thus ransomed is called *mukâtib*, until the ransom is fully paid. During the interval of the promise of freedom and the payment of the money the *mukâtib* enjoys a certain degree of freedom, but is, nevertheless, placed under certain restrictions. For example, although he is free to move from place to place, he cannot marry or bestow alms, or become bail, or grant a loan, or make a pilgrimage, etc., without the permission of his master. (Hughes, p. 598.)

[3] This ransom or redemption money is the Hausa *murgu*.

[4] i.e., a *ḳiṭâ'ah* form of enfranchisement, see Section XXIV. p. 365.

[5] See p. 354.

[6] *Atâk*, see p. 351.

Section II

Of the Wording of the Agreement and of such Stipulations as may be Legally Inserted [1]

Section III

Of Contractual Enfranchisement granted by a Guardian in the name of his Pupil

Section IV

Of the Contractual Enfranchisement of a Female Slave and of a young Slave Child

The contractual enfranchisement of a female slave is lawful; also that of a child of ten years or older; even though neither possess any *peculium* and can earn none; but they must be able to earn their own subsistence.

Section V

Of the Sale of an Agreement for Enfranchisement

Section VI

Of Declarations made by a Master when sick as to the Instalments of the Ransom. Of Contractual Enfranchisement granted by a Master when on his death bed.

Section VII

Of collective Contractual Enfranchisement

Section VIII

Of Options

Section IX

Of Contractual Enfranchisement granted by Co-Proprietors to their Slave [2]

Section X

Of a case in which a Part of the Ransom is of necessity not payable

[1] There is nothing in this long section of any practical interest. The wording of the agreement may be in any form, it is not even absolutely necessary to state the amount of the ransom. Such an agreement is not considered as a debt or a sale and may thus be modified. The tendency of the law is to facilitate the enfranchisement.

[2] If a slave is contractually enfranchised by one of two co-proprietors, the master who has entered into the agreement with his *mukâtib* pays the co-proprietor the estimated value of his share in the *mukâtib*, or, if unable to do so, the slave is only partially enfranchised. (*Tuḥfat*, note 1230.)

Section XI

Of the Civil Status of a *Mukâtib* Slave

A *mukâtib* slave has the right to perform the following acts without obtaining his master's express authority :—to buy and to sell ; to associate himself in a commercial enterprise and to take his share of the profits ; to marry or not to marry any one of his own slaves ;[1] to travel, so long as the instalments of his ransom are duly paid.

A *mukâtib* slave has not the right, without obtaining his master's sanction :—to free his own slave ; to make a gift ; to marry ; to travel to a far country, even though the instalments of his ransom are duly paid.

Section XII

Of the Insolvency of a *Mukâtib* Slave

The Law takes the most lenient view possible in the case of a *mukâtib* slave who is unable to fulfil his obligations as they become due. The Court can receive the instalments of ransom on behalf of the master in the event of the latter's absence.

Section XIII

In the event of Death of the *Mukâtib* Slave

Section XIV

Of the Contractual Enfranchisement of a Slave by a non-Muhammadan Master

Section XV

Of Expiations Incumbent upon a *Mukâtib* Slave

Section XVI

Of Illegal Reservations and Exceptions inserted in an Agreement for Enfranchisement

Section XVII

Of the Consequences of Insolvency of the *Mukâtib* Slave

Section XVIII

Of Concubinage between the Master and a *Mukâtib* Slave

The master who takes his *mukâtib* slave as a concubine commits an unlawful act and may be sentenced to a correctional punishment. If a *mukâtib* slave has a child by her master she may either elect to declare herself incapable of fulfilling the terms of her agreement and

[1] In Shâfi'i Law no slave can marry more than two wives, i.e., half the number that a freeman may marry (Lane, I. p. 127 ; *Minhâj*, II. p. 343), but in Mâliki Law he may have four, see p. 99.

to remain with her master as a *umm walad*,[1] or to remain under her *kitâbah* with the additional capacity of a *umm walad*; in this case she receives her freedom on paying her ransom in full, or on the death of her master, whichever first happens, her maintenance being at her master's charge.

Section XIX

Of the Murder of a *Mukâtib* Slave

Section XX

Of the Case of a *Mukâtib* Slave buying a Slave who could not lawfully be in the possession of his Master [2]

Section XXI

Of Issues that may arise with respect to Contractual Enfranchisement

The declaration of the master, without oath, is accepted in the case of an issue between the *mukâtib* slave and his master as to the former having acquired his complete freedom. The master's declaration is again accepted, if on oath, whenever there is question as to the payment of the instalments of the ransom. If the master will not make oath and the slave does so, the latter receives his freedom.

The declaration of a *mukâtib* slave is accepted on an issue as to the amount of the ransom contained in the agreement, if he makes oath and his declaration appears to be reasonable. If, however, the master's declaration appears to be the most reasonable and he makes oath, the case is decided in his favour.

If there is issue as to the other terms of the agreement, the Court decides in favour of the *mukâtib* slave, for the Law is in favour of a slave establishing his freedom.

Section XXII

Of Cases in which Help has been given to a *Mukâtib* Slave in order that he may liberate himself

Section XXIII

Of Testamentary Dispositions Relative to a *Mukâtib* Slave

[1] See p. 367, note 1. The *umm walad* receives her freedom on her master's death irrespective of whether her value falls within the disposable third of the estate or not.

[2] The case probably refers to the *mukâtib* slave buying a slave who is a near relation of his master's.

SECTION XXIV

OF ENFRANCHISEMENT ON IMMEDIATE PAYMENT OF RANSOM[1]

If, for instance, the master says to his slave : —'I give you your freedom for a thousand pieces of silver,' or 'You are free and you owe me a thousand pieces,' the slave at once acquires his freedom and the ransom is at once payable.

[1] Cf., p. 354. This form of enfranchisement is known as *ḳitâʿah*. (*Tuḥfat*, note 1228); cf., Hausa, *pansa*.

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CHAPTER LII

MATERNAL ENFRANCHISEMENT (*ISTÎLÂD*)[1] OR ENFRANCHISEMENT BY REASON OF MATERNITY

SECTION I

1. GENERAL OBSERVATIONS. 2. OF THE DECLARATION AND OF THE JUSTIFICATION OF THE RIGHT OF THE SLAVE MOTHER TO ENFRANCHISEMENT. 3. OF THE IRREVOCABILITY OF MATERNAL ENFRANCHISEMENT

Sub-section 1. General observations.

THE slave who has become a mother by the act of her master[2] is known in law as *umm walad*, 'the mother of offspring,' and has henceforth the right to enfranchisement on the death of her master and as a first charge on his estate. The mother of offspring has thus, as a special characteristic, that status of freedom which appertains to her child, conceived by the act of her master; and this status her master can no more deny to her than he can to his child.[3]

Sub-section 2. Of the declaration and of the justification of the right of the slave mother to enfranchisement.

The status of 'mother of offspring' is established from the moment that the father has acknowledged his child.[4]

As a general principle, when the master has stated that he has cohabitated with his slave, it is sufficient for the mother to have been delivered even of a still-born child, for her to acquire the status of 'mother of offspring.'

[1] '*Istîlâd*, lit. "the offspring's claim," signifies a man having a child born to him of a female slave, which he claims and acknowledges as his own, which acknowledgment becomes *ipso facto* the cause of the freedom of the female slave. The woman is then called *umm walad* and stands in relation to her master as his wife, the child being also free.' (Hughes, p. 598.)

[2] There are no restrictions to the number of concubines that a master may have from among his slaves (Suras iv. and xxxiii.), but in *Ḥanafi* and *Shâfi'i* Law, a master cannot have intercourse with his pagan slave. (Hughes, p. 600; Lane, I. p. 233.)

[3] If, however, the mother is not the slave of the master but of his wife, the mother would not be *umm walad* unless sold or presented to the father before the birth of the child.

[4] The child, though not free-born, is born free, unless the father repudiates paternity.

Sub-section 3. Of the enfranchisement of the 'mother of offspring.'

The 'mother of offspring' becomes free on the death of her master and her value is a first charge on his estate.

Should a 'mother of offspring' have a child by another than her master, he too becomes free together with his mother.

Sub-section 4. Of the irrevocability of maternal enfranchisement.

No debt contracted by the master before the status of 'mother of offspring' is acquired can interfere with her eventual enfranchisement. If, however, the master of a 'mother of offspring' becomes bankrupt, the slave-mother may be sold for the benefit of the creditors.

Sub-section 5. Of certain circumstances with respect to maternal enfranchisement.

Section II

Of the Rights and Duties of the Master towards the 'Mother of Offspring'

The master of a 'mother of offspring' may require of her a certain amount of domestic service intermediate between that furnished by a wife and a slave. He may also require her to bring up at her charge any children she may have by another than himself, for such children also will be enfranchised at his death and as a first charge on his estate. The master of a 'mother of offspring' has no right to marry her [1] to another against her consent and is much to be blamed if he does so, even with her consent. He may not sell her and he is held responsible for the amount of all judgments pronounced against her.

Section III

Of the Case in which a Master on his Death-bed declares his Slave to be a 'Mother of Offspring'

Section IV

Of the Case of one or more Joint-owners Cohabiting with their Slave

Section V

Of the Status of the 'Mother of Offspring' in the event of the Apostasy of her Master

Section VI

Of the Contractual Enfranchisement of a 'Mother of Offspring'

[1] But it is commendable to free her and marry her, provided the father has not already four wives (Lane, I. pp. 128, 236); whilst Mr. Gowers in his rendering into Hausa of portions of the *Risâlah* (p. 31) considers that 'he is entitled to treat her as if she were a legal wife.'

CHAPTER LIII

PATRONAGE (*WALA'*[1])

Section I

Definition. Of the Acquisition of the Rights of Patronage

Section II

Of the Extension of Patronage over the Family of the Enfranchised Slave

Section III

Of the Judicial Verification of the right of Patronage.

Section IV

Of those who have Rights to the Succession of an Enfranchised Slave

[1] It will be sufficient if a definition of patronage in Muhammadan law is given, *Wala'*, lit., proximity, kin, is a peculiar relationship voluntarily established and which confers a right of inheritance on one or both parties connected. *Wala'-ʿatâḳa* is the relationship between a master and a manumitted slave, in which the former inherits any property the latter may acquire after enfranchisement. (Hughes.) But this only applies if the freed slave leaves no sharers or agnates ; cf., Zeys, p. 259 and *Risâlah*, rule 224.

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CHAPTER LIV [1]

LEGACIES (*WAṢIYYAH*)

GENERAL REMARKS.—In the early days of Islâm full testamentary power was accorded so long as not more than one third of the estate was so disposed of. A testator could make bequests in favour of his father, mother or other near relatives. But all commentators are agreed that Sura ii. 176 has been abrogated. A testator can no longer make bequests to one or more of his heirs, unless all the other heirs ratify the bequests so made. So long as a person is living, he is the absolute owner of all his property and may dispose of it as he pleases, but as soon as he is dead, his property, with the exception of the disposable third, becomes that of his heirs. If, then, he has disposed of it, he has disposed of what does not belong to him, unless the heirs choose to ratify the disposal made by the deceased.

DEFINITION.—A testament is that act by which the testator places a lien on the disposable third of his property, which will become definitive on his decease; or appoints a testamentary guardian to represent him after his death.

THE TESTATOR.—To make a bequest that shall be valid the testator must be a freeman, of sane mind, and the owner of the chattels constituting the legacy. A legacy made by a minor is only invalid if it appears that he was not possessed of full discernment.

THE LEGATEE.—The only condition necessary in the legatee is that he should be a Muslim and not an heir of the testator. Thus a bequest is valid if made in favour of a legatee known to be dead, in which case the amount will be used to pay off his debts or will be divided among his heirs. A bequest is also valid if made in favour of some undetermined person or for some object, such as the upkeep of a mosque, the building of a bridge, etc.

THE LEGACY.—The chattel to be bequeathed need not be specified; it is sufficient to bequeath one-third or one-fourth of one's estate. A legacy of a thing non-existent at the time is valid; in which case the thing specified will have to be acquired and delivered to the legatee.

[1] This chapter is briefly summarized from Zeys, II. p. 211 et sq. The making of bequests or legacies is at present almost unknown in West Africa, but with the increase of education and the growth of confidence in the Native Courts, it is not improbable that the practice may in time become more general.

THE FORMULA.—It is sufficient that the testator's intention be manifest.[1]

REVOCATION OF A LEGACY.—A legacy may at any time be revoked by the testator, either expressly or tacitly.

TESTAMENTARY GUARDIAN.—A father may appoint by testament a *waṣî*, with full or limited powers, to administer the property of minors or to constrain them to marry. As the *waṣî* continues the *patria potestas*, so he himself may appoint by testament a *waṣî* as his successor. A wife may be appointed *waṣî* by her husband, but in no case may an Unbeliever be appointed.[2]

[1] A testamentary disposition may be either by word of mouth or in writing. In either case it must be made before two witnesses who are neither heirs nor legatees.

The following translation of a written bequest is taken from Zeys and Sidi Saïd, p. 173, wherein the Arabic text is also given.

Praise be to God!

Before the two assessors of the Court at ----- there appears the honourable -----, of full legal capacity. He deposes that he bequeaths to his near relation[a] ----- the third of what will constitute his estate, whether that amount shall be great or small, whether movables or immovables, whether animals or any other property found within or without the city of Algiers.

This is a lawful and valid legacy, executory on the death of the testator, made in the sight of God Almighty and in view of His Eminent Reward, for He rewards those that give alms and never permits the righteous to perish.[b]

Witnessed this——day of——.

[2] A *waṣî* who proves to be unworthy may be removed by the Ḳâḍi (*Risâlah*, rule 220).

[a] This relation may be a connection by marriage or even a brother-german if testator has a son, in which case the latter would exclude the former.

[b] Cf., Korân, xviii. 29.

CHAPTER LV

SUCCESSION[1] (*FARA'IḌ*)

DEFINITION.—Succession is a right capable of division which, by the death of him who held that right, devolves upon his heirs.[2]

THIS definition shows that seizin [3] exists in Muhammadan Law.

Not until the succession is open have the successors any rights whatever to the estate of their predecessor; thus it is that the latter can dispose *intra vivos* of the whole of his property, but as soon as he is dead and by the fact only of his death, his rights devolve upon his heirs.

DIVISION OF THE SUBJECT.—The assets of a succession consist of all the property of the deceased after abstraction made of what may be called the debits, taking the term in its widest sense. The balance,[4] after deduction of all prior charges on the estate, then falls to be divided between the sharers who take precedence of all other heirs. If, then, there remains anything over of the estate, it is divided among the residuaries or agnates.[5] Thus the subject falls into three sections :—

I. Of the prior charges.
II. Of the sharers.
III. Of the residuaries or agnates.

SECTION I

OF THE PRIOR CHARGES

The order in which the prior charges on an estate are paid out are as follows :

A. Actual and ascertained liabilities.

[1] The difficult subject of succession has been rendered from Zeys's text-book [a] with annotations from Luciani, a standard work on the subject. A thorough study of the whole chapter is necessary before a conclusion on any particular case can safely be formed.

It may be noted that Shâfi'i Law does not materially differ from Mâliki Law on the subject of succession; cf., Luciani, p. 11.

[2] The definition of inheritance in English law is : a perpetual or continuing right to an estate, vested in a person and his heirs.

[3] Seizin is feudal possession, as distinct from mere possession or occupation.

[4] In Arabic, the *mîrâth*, or inheritance to be distributed among the heirs. (*Risâlah*, note 224.)

[5] *Âṣib*, pl. *ʿaṣabah*.

[a] By kind permission of the Publisher, M. Adolphe Jourdan, Algiers.

B. Funeral expenses.
C. The debts of the deceased.
D. Legacies, within the limits of the disposable third of the estate.

A. *Actual or Ascertained Liabilities.*—By this is meant liabilities which in reality are no charge on the estate, such as tangible goods given by way of pledge or security, or by way of deposit or gratuitous loan.[1] Included also would be the estate of a judicially declared bankrupt, as also the death duty.[2] [3]

B. *Funeral Expenses.*—These are the first of the real prior charges on the estate, for they have actually to be paid out of the assets of the estate. Included under these expenses are those connected with the washing of the body, the shroud, transport to the cemetery, burial; as well as of the distribution of food and small money according to custom.[4]

C. *Debts.*—The debts of the deceased of whatever nature, whether guaranteed or not by a third party, are next to be paid out of the estate.[5]

D. *Legacies.*—Then come the payment of legacies from the disposable third of the balance of the assets remaining after A. B. and C. have been satisfied.[6]

Section II

Of the Sharers

General Remarks.—The theory of succession, briefly stated, is: to the women a fixed share (*fara'iḍ*) laid down by the Korân, the surplus to the male heirs, that is to the agnates or residuaries. The sharers do not, however, consist entirely of female heirs, a few males are admitted into this class, either by reason of their relationship to the deceased through marriage, or by being assimilated to women by reason of their advanced old age. The position thus taken by women in the law of succession was the principal reform introduced by Muḥammad.

[1] Also the *umm-walad* (p. 367).
[2] i.e., the *zakât* (Hausa *gado*), see p. 52.
[3] And the widow's maintenance during the *'iddah* of four months and ten days. (Luciani, p. 22).
[4] In the case of a pauper who had no one to support him, the expenses are paid out of the *bait al-mâl*. (Idem, p. 29.)
[5] In the A category of prior charges was included the death duty. The death duty is apparently a prior charge in category A if the *niṣâb* still exists at the time of the decease of the owner of the *niṣâb*, and in that case Luciani refers to it as *'ushr* or tithe. When the *niṣâb* no longer exists at the time of decease, the tax is payable under category C and Luciani then refers to it as *zakât* or tax of purification, cf., Luciani pp. 22, 32 and 205. On this subject of practical importance the commentators are exceedingly vague, but it is certain that the tax known in Hausaland as *gado* has a perfectly lawful foundation.
[6] Slaves under *'atâk*, when pronounced on death-bed (p. 354, note 4), and under *tadbîr* (p. 357, note 3) declarations of enfranchisement come under this category

DEFINITION.—A share is that fixed part of an estate which the Law assigns to certain heirs. This share can only be modified by the method of reduction or *'aul.*[1]

THE SHARES.—Shares are of the following fractions only : $\frac{1}{2}$, $\frac{1}{4}$, $\frac{2}{3}$, $\frac{1}{3}$, $\frac{1}{6}$ of the estate, after all prior charges have been met.[2]

Sub-section 1. The half share.

The sharers entitled to a share of $\frac{1}{2}$ are :

A. *The husband.*

B. *The only daughter.*

C. *The daughter of the son* in the absence of B.

D. *The sister german,*[3] when she stands alone and in the absence of C.[4]

E. *The sister consanguinean,*[3] when she stands alone and in the absence of D.[4]

But one must not be led into the mistake of considering these shares as absolute. They are all modifiable by the presence of certain other sharers as in the cases given below. At times even, but more rarely, the sharer becomes an agnate ; still more rarely he remains a sharer whilst taking on the rights of an agnate ; and yet more rarely the Law allows him a right of option.

Thus in the list of half sharers given above :

A. If there are children[5] of either sex succeeding along with the husband, his share is reduced from $\frac{1}{2}$ to a $\frac{1}{4}$.[6]

B. *Daughters*[7] take a share of $\frac{2}{3}$. They become agnatised by the existence of a brother of the same blood[8] and then each one of the daughters receives one half[9] of the brother's portion.[10]

C. *Daughters of the son* are sharers also of $\frac{2}{3}$. The daughter or

[1] That is, when the total of the fractions representing the shares is greater than unity. See p. 392.

[2] There is also a special share assigned to the mother in certain exceptional cases, known as ' the third of the remainder ' ; see the two cases known as al-Gharrâ'an, p. 378.

[3] It may be as well to explain here that by german is meant the full blood ; by consanguinean the half-blood, i.e., the same father but different mothers ; and by uterine, relationship through the same mother but different fathers.

[4] Korân, iv. 175.

[5] Including sons' children.

[6] Korân, iv. 13. Of the sharers of $\frac{1}{2}$, only the husband and the sister german or consanguinean can exist together and retain the full share of $\frac{1}{2}$ without modification or exclusion.

[7] The reader is asked to pay special attention as to the singular or plural of the terms of relationship ; e.g., a daughter is a sharer of $\frac{1}{2}$, daughters of $\frac{2}{3}$.

[8] i.e., in competition with their own brother german or consanguinean.

[9] Korân, iv. 12. ' The ratio 2 : 1 as between males and females is another general principle in succession.' (*Risâlah*, p. 107.)

[10] The word ' portion ' is used to designate the part of a succession due to an agnate, as the word ' share ' is employed with reference to a sharer. But it not seldom happens that it is uncertain whether an heir receives a part in his capacity as agnate or as sharer.

daughters of the son are not excluded by the daughter of the deceased but become the sharer of $\frac{1}{6}$, or of $\frac{1}{6}$ divided *per capita* if they are more than one. By the existence of a brother[1] of the same blood[2] the granddaughters become agnatised.[3] Granddaughters are entirely excluded from the succession by the existence of a son or of daughters of the deceased, unless agnatised by the existence of a son of a son[4] of the deceased.[5]

D. *Sisters german*[6] have a share of $\frac{2}{3}$. The sister or sisters german become *agnatised by* the existence of the brother german[7] or the paternal grandfather,[8] and are *agnatised along with others*[9] by a daughter or daughters[10] of the deceased.[11]

E. *Sisters consanguinean* have a share of $\frac{2}{3}$. They are not excluded by a sister german, but their share then becomes one of $\frac{1}{6}$, the complement of the $\frac{2}{3}$.[12]

The sister consanguinean becomes agnatised by the existence of a brother of the same blood, or of a paternal grandfather, and is agnatised *along with others* by the existence of a daughter of the deceased. But she is excluded from succession by the existence of a brother german of the deceased or of two sisters german, unless she has been agnatised.[13]

[1] i.e., the deceased's grandson by the same son as the granddaughter.

[2] Or of a cousin, the deceased's grandson by another son; or in certain cases by the existence of a great-grandson of the deceased through males. (*Risâlah*, p. 108.)

[3] Or, as the Muslim jurists express it, rendered *'aṣabah by another*, by the existence of a male heir of the same class and degree. (*Risâlah*, p. 107).

[4] i.e., a cousin, see note 2 *supra*.

[5] The share of granddaughters is not explicitly mentioned in the Korân. They are *assimilated* to the daughter, in default of the latter, in the same way as grandsons are assimilated to the sons. (Luciani, p. 209).

[6] The sister or sisters german are excluded from the succession by the existence of the following agnates: sons, sons' sons, the father.

[7] And receives one half of the brother's portion as a residuary.

[8] Unless the deceased has left brothers consanguinean, in which case the sister german remains a sharer.

[9] Cf., *Risâlah*, appendix K, p. 109.

[10] Or granddaughter or granddaughters.

[11] Unless agnatised *through* another, e.g., by the existence of a brother german or paternal grandfather. This agnatisation *along with* others serves to avoid injustice to the daughters; for example, if the deceased leaves two daughters and two sisters german, the share of the daughters is $\frac{2}{3}$ and of the sisters $\frac{2}{3}$, or a total of $_3$. By the process of reduction, the daughters who are entitled to preference over the sisters, would receive $\frac{1}{2}$ instead of $\frac{2}{3}$; but by agnatising the sisters, the daughters retain their share of $\frac{2}{3}$, and the sisters take the remainder in their acquired capacity as residuaries. Cf., *Risâlah*, p. 109.

[12] By 'the complement of the two thirds' it is meant that the sisters consanguinean in competition with a single sister german are awarded the difference between the share of a sister german, i.e., $\frac{1}{2}$, and the share of sisters german, i.e., $\frac{2}{3}$, had they existed: $\frac{1}{2} - \frac{2}{3} = \frac{1}{6}$, which is awarded *per capita* to the sisters consanguinean. Were there two sisters german along with sisters consanguinean the latter would be excluded unless there was a male heir along with them.

[13] Agnatised heirs will be found fully dealt with in Section III. p. 387 et sq.

Sub-section 2. The quarter share.[1]

There are only two heirs who are entitled to a share of $\frac{1}{4}$ and one of them figures in the preceding list :

A. *The husband* when there are children or step-children.[2]

B. *The wife or wives* when the husband has left no posterity.[3] If the deceased husband has left posterity the widow or widows are then sharers of $\frac{1}{8}$ only.

For spouses to inherit the one from the other they must be Muslims, the successor must not have murdered the predecessor, they must be free and the marriage must have been a lawful one. They inherit the one from the other as soon as the marriage has been contracted and the right remains during the *'iddah* after a revocable repudiation.

Sub-section 3. The one-eighth share.[4]

The only sharer of $\frac{1}{8}$ is *the wife* or *wives* mentioned above. The filiation of the husband's child or children must have been recognized by him, which excludes those whom he has disavowed by *liʿân*.

Sub-section 5. The one-third share.

The sharers of $\frac{1}{3}$ are :

A. *The mother*,[5] if the deceased has left no posterity, nor more than one brother or one sister.[6] The existence of a descendant reduces the mother's share to $\frac{1}{6}$, as also does the existence of two or more brothers or sisters german, consanguinean, or uterine. It would be thus, even were these last themselves excluded by another sharer ; which fact constitutes a remarkable derogation from the rule by which an heir must be a successor in order to exclude another or to reduce his portion. In the case of the deceased leaving a mother, two brothers uterine and his paternal grandfather : the mother receives $\frac{1}{6}$ because of the existence of the two brothers uterine, these, however, are excluded by the grandfather, just as they would be by the existence of the father of the deceased or by a descendant of either sex.[7]

The mother's share may further be modified in the two following cases which are characteristically called 'the two deceptions.'

(*a*) The mother by the death of her daughter finds herself in com-

[1] Korân, iv. 13, 14.

[2] Or grandchildren through males. The husband's share is also reduced to $\frac{1}{4}$ where the wife leaves an illegitimate child, who inherits from her. (Luciani, p. 211).

[3] The Law recognizes no relationship between illegitimate children and their father. (Luciani, p. 212.)

[4] Korân, iv. 14.

[5] Korân, iv. 12.

[6] Nor more than one brother *and* one sister.

[7] Again, if deceased leaves a grandfather, a sister german and a sister uterine, the last will be excluded by the grandfather, but her existence together with that of the sister german serves to reduce the mother's share to $\frac{1}{6}$. (Luciani, p. 217.)

petition with the surviving spouse and deceased's father. The widower's share in his wife's succession is then $\frac{1}{2}$ or $\frac{3}{6}$, and the remaining half is divisible between the father and mother. But the father, being a male, must receive twice as much as the mother, who then, in Khalîl's phrase, only gets 'the third of the remainder' after the widower has got his $\frac{3}{6}$.

Thus: the widower . . . . . $\frac{3}{6}$ or $\frac{1}{2}$
the mother . . . . . $\frac{1}{6}$ or $\frac{1}{6}$
the father. . . . . $\frac{2}{6}$ or $\frac{1}{3}$

The mother is thus nominally the sharer of $\frac{1}{3}$, but in reality of '$\frac{1}{3}$ of 'the remainder,' *i.e.*, $\frac{1}{3} \times \frac{3}{6}$. It might well be said that the mother is no longer a sharer, but that she has become an agnatised residuary by the existence of the father and receives the half of a male portion.[1]

(*b*) In the second case [2] the deceased leaves his mother and father and wife surviving him. The sharing is then by fourths; the widow receives $\frac{1}{4}$, the mother $\frac{1}{3} \times \frac{3}{4}$ or $\frac{1}{4}$, and the father $\frac{1}{2}$.[3]

B. *The brothers or sisters uterine*, when two or more.[4] When standing alone a brother or sister uterine gets $\frac{1}{6}$.[5] They are completely excluded by the presence of certain sharers: the grandfather, father or a descendant of either sex.[6]

C. *The paternal grandfather*, but only under certain conditions which are studied in the next sub-section.[7]

Sub-section 6. The one-sixth share.

A. *The daughter of the son* when in competition with a daughter [8]; when there are several daughters of the son in competition with one daughter, they divide the share of $\frac{1}{6}$ [9] *per capita*.[10]

B. *The sister or sisters consanguinean* in competition with a sister german [11] to complete the $\frac{2}{3}$.[12]

[1] This case is known as the *second case* of al-Gharrâân. (*Risâlah*, p. 104.)
[2] The *first case* of al-Gharrâ'ân. (*Risâlah*, p. 104.)
[3] This case is an exception to the general rule that there cannot be more than one sharer or group of sharers receiving $\frac{1}{4}$ in any one succession. (Luciani, p. 220.)
[4] They divide the share of $\frac{1}{3}$, brothers and sisters participating equally in this instance, (*Risâlah*, rule 256.) Cf., also Korân, iv. 15.
[5] In the same way as the mother, who is the link with the deceased, receives $\frac{1}{3}$ or $\frac{1}{6}$ as the case may be. (Luciani, p. 223.)
[6] See p. 377. [7] See p. 379 et sq. [8] See p. 376.
[9] i.e., 'the complement of the two-thirds,' see p. 376, note 12.
[10] Following the general rule, if the deceased leaves a granddaughter and great-granddaughter through males, the granddaughter would be *assimilated* to a daughter and the great-granddaughter to a granddaughter. (Luciani, p. 231.)
[11] Were there more than one sister german, the sister or sisters consanguinean would be excluded unless agnatised by a brother consanguinean or a grandfather. (Luciani, p. 232); see also p. 376.
[12] See p. 376, note 12.

C. *The brother uterine or sister uterine* when the one or the other stands alone.

D. *The father*, when the deceased leaves a son or grandson who receives the remainder, i.e., $\frac{5}{6}$. Where the deceased leaves a daughter, the father as sharer receives $\frac{1}{6}$ and as an agnate the remainder after the daughter or son's daughter has received her share, i.e., $\frac{1}{2}$. In this case :

daughter or granddaughter	$\frac{1}{2}$	
father as sharer	$\frac{1}{6}$	$= \frac{1}{6}$
father as agnate	$\frac{1}{3}$	

It is impossible to understand the mechanism of succession if the privileged position of the father and paternal grandfather is not grasped. Their dominant capacity is that of agnates, but as agnates only they might be excluded as heirs by the existence of agnates of the *first class* [1] (sons, sons' sons) were they not also included, fictively as it were, on the list of sharers ; their rights as successors can therefore never lapse. Thus, since a son excludes all the more remote agnates, the father of the deceased who has left a son would, as an agnate, be entirely excluded, but as a sharer his share of $\frac{1}{6}$ is at any rate assured to him.

E. *The mother*,[2] where the deceased has left a descendant of either sex or more than one brother or sister. She is not excluded by the presence of the father ; like him, her share is $\frac{1}{6}$, but, unlike him, she has no right to participate in the remainder since she is not an agnate.

F. *The grandmothers*,[3] where in the case of the maternal grandmother, the deceased has left no mother, and in the case of a paternal grandmother, where he has left no father.[4] If both grandmothers are alive, they equally divide the share of $\frac{1}{6}$.

G. *The paternal grandfather*, where the deceased has left no father and under the same conditions as the latter ; with the exception that whereas the father excludes all brothers of the deceased, the grandfather only excludes the deceased's brothers uterine.

The maternal grandfather is never a sharer.[5]

Thus the paternal grandfather may either be : (*a*) a sharer of $\frac{1}{6}$

[1] 'Agnates are divided into six classes, viz. :—1. descendants through males : 2. the father : 3. the grandfather and the brothers : 4. the nephew, brother's sons : 5. the uncles : 6. the patron.' (*Risâlah*, p. 110.) Descendants are thus preferred to ascendants. See also p. 387.

[2] See p. 377.

[3] For a full exposition of the grandmother's and great-grandmother's share and of the differences that exist between the Mâliki and Shâfi,i Schools, the student is referred to Luciani, pp. 238–251.

[4] Zeys, II. p. 246 here adds the words : but in either case where he has left descendants, inferring thereby that, were there no descendants, the grandmother would be assimilated to the mother and would receive $\frac{1}{3}$, as the mother does in a similar case. Such an opinion is held by some jurists (Luciani, p. 238), but is not generally received.

[5] Consequently the word 'grandfather' throughout stands for paternal grandfather, or other ascendant of the father.

when he is in competition with a male descendant, or with sharers who, together with his share of $\frac{1}{6}$, absorb the whole of the estate; (*b*) a sharer of $\frac{1}{3}$,[1] when along with brothers and sisters german or consanguinean, but only under certain conditions; and (*c*) he may, whilst retaining his capacity as a sharer of $\frac{1}{6}$, find himself under certain special conditions which will now be studied.

Let us first see how the grandfather becomes a sharer of $\frac{1}{3}$. This occurs when the grandfather finds himself in competition with brothers or sisters german or consanguinean and no other sharers. In this case he has the option of either taking a $\frac{1}{3}$ share of the succession or of participating as an agnate along with the brothers and sisters. The paternal grandfather ranks fourth among agnates; brothers german, fifth; and consanguinean, sixth.[2] Again, sisters german and consanguinean are agnatised by the existence of a brother of their own blood or by the grandfather. We must now see what happens when the latter is along with brothers or sisters, german or consanguinean; or with brothers german; or with brothers consanguinean; or with sisters german or consanguinean.

Taking first the case where the grandfather is along with sisters german or consanguinean, without there being brothers either german or consanguinean. The grandfather agnatises the sisters; if there be but one sister she takes the half of a male portion and the grandfather a whole; it is then in his interests to inherit along with the sister. Were there two sisters, his interests would again be to inherit along with them, for they receive but a whole portion between them. Again, when there are three sisters, for they but receive a portion and a half.[3] If there were four sisters it would make no difference to the grandfather whether he inherited along with them or took the share which the Law allows to him, since the four sisters are entitled to two male portions and he to one, that is to say, one-third of the estate.

In other words, when it is to the advantage of the grandfather to do so, he inherits along with the sisters and is considered as if he were their brother.[4]

[1] The grandfather can only be a sharer of $\frac{1}{3}$ of the succession when there are no other sharers. When he is along with sharers, e.g., a widow or mother, he is a sharer of $\frac{1}{3}$ *of the remainder* only. Cf., Luciani, p. 340.

[2] See p. 379, note 1. Note that the grandfather and brothers stand in the same degree of relationship to the deceased; but as the former is an ascendant and the latter collaterals, the grandfather would, according to the general rule, exclude the brothers; and this is the case in Ḥanafi Law, where the grandfather is in all respects assimilated to the father. Cf., *Risâlah*, pp. 115 and 116; Luciani, p. 233.

Brothers uterine are in all cases excluded by the grandfather, just as they are by the presence of the father.

[3] In all these cases, the sisters are participating as agnates, being agnatised by the presence of the grandfather.

[4] Khalîl's text runs: The grandfather who finds himself in competition

If, instead of sisters only, we suppose the grandfather in competition with five brothers and four sisters:

the 5 brothers inherit	5	portions
the 4 sisters ,,	2	,,
Total . .	7	

Were the grandfather inheriting along with them, he would receive but one portion, or $\frac{1}{8}$ of the estate. It is thus to his advantage to claim $\frac{1}{3}$ as his share and the remaining $\frac{2}{3}$ will be divided among the brothers and sisters in the ratio 5 : 2; each brother getting $\frac{2}{7} \times \frac{2}{3}$ of the estate and each sister $\frac{1}{7} \times \frac{2}{3}$.

But there remains one difficulty to be solved. The situation of the paternal grandfather appeared altogether too advantageous; he was always in a position to receive a very considerable portion of the estate. For suppose that the deceased left £100 and his only heirs were his grandfather and his brother german. It is evident that the former would claim to rank along with the brother and thus receive £50 instead of a share of $\frac{1}{3}$, in which case he would get but £33-6-8. When there are no other heirs, this must be the result, and the brother german is the only sufferer, and he is lucky to participate in competition with a nearer agnate.[1] But when, in addition to the grandfather and brother german, there exist one or more brothers consanguinean, a curious method has been invented to prevent the grandfather receiving too considerable a portion. The brothers consanguinean are fictitiously ranked as brothers german, so as to force the grandfather to become a sharer of $\frac{1}{3}$. Then when his share has been accounted for, the brothers consanguinean revert to their original capacity as consanguineans and are then excluded from participation by the brother german, who then receives $\frac{2}{3}$ of the estate.[2] The artifice employed appears singular.

The jurists have greatly extended the operation of what they call 'the remedy to prevent the grandfather from receiving too great a portion of the inheritance.' They in the first place decide that this fictitious ranking of brothers consanguinean as german can take place even in the case where there are several residuaries as well as the brother german and the brothers consanguinean; even though the existence of those residuaries would in themselves cause a reduction in the portion of the grandfather. Thus, the jurists give the following example:—

with brothers or sisters, german or consanguinean, has the right to a share of $\frac{1}{3}$ or to rank as an agnate, according to what may be most advantageous to him. (Zeys, II. p. 247.)

[1] See p. 380, note 2.

[2] Cf., *Risâlah*, rule 298.

The deceased's heirs are the grandfather, the brother german, brothers consanguinean, his mother and one widow:

The mother's share is	$\frac{1}{6}$ or	$\frac{2}{12}$
The widow's share is	$\frac{1}{4}$ or	$\frac{3}{12}$
Total . .		$\frac{5}{12}$

The brothers consanguinean are then made to rank as germans, thus forcing the grandfather to take his place as a sharer of $\frac{1}{3}$ of the remainder,[1] namely, $\frac{7}{12} \times \frac{1}{3} = \frac{7}{36}$. The brothers consanguinean then resume their proper place as consanguineans and are totally excluded by the brother german, who then takes the residue of the estate, that is, $\frac{14}{36}$. If the grandfather had participated as an agnate along with the brother german, each of their portions would have been $\frac{10\frac{1}{2}}{36}$ instead of, as it is, $\frac{7}{36}$ to the grandfather and $\frac{14}{36}$ to the brother german.

By another application of this remedy, the sister german causes the brother consanguinean to rank as german. But in this case the solution is not the same on account of the sex of the sister german. Suppose the heirs are: the grandfather, a sister german, a brother consanguinean.[2] Counting the brother consanguinean as a brother german, the denominator becomes 5, since there are 2 parts for the grandfather, 2 for the brother and 1 for the sister. The grandfather receiving $\frac{2}{5}$ [3] and the sister $\frac{1}{2}$, there remains $\frac{3}{5} - \frac{1}{2} = \frac{1}{10}$ for the brother consanguinean. Thus:

to the grandfather as agnate	$\frac{2}{5}$	$\frac{4}{10}$
,, the sister as sharer	$\frac{1}{2}$	$\frac{5}{10}$
,, the brother consanguinean[4] the remainder	.	$\frac{1}{10}$

We have not done with the grandfather; for this heir, the most embarrassing and perplexing of all the successors, gives rise to yet other difficulties.

Thus, when the grandfather is along with sharers and brothers german or consanguinean, he has the option between the $\frac{1}{3}$ of the residue, the $\frac{1}{6}$ of the whole succession, or of dividing the residue along with the brother or brothers.

1*st Example.* The deceased leaves a widow, two daughters, the paternal grandfather, and a brother german or consanguinean.

The widow as sharer receives	. . . .	$\frac{1}{8}$ or $\frac{3}{24}$
The daughters as sharers receive	. . .	$\frac{2}{3}$ or $\frac{16}{24}$
The grandfather as sharer receives	. . .	$\frac{1}{6}$ or $\frac{4}{24}$
The brother, the residue	. . . .	$\frac{1}{24}$

It is evident that it is in the interest of the grandfather to opt for

[1] See p. 380, note 1.

[2] This is one of the cases known as *zaidiyya* in which a fraction remains over for the brothers or sisters consanguinean. This particular case is known as *al-âʿshâriyya* from the word *ʿashr*, ten, which is the common denominator of the fractions representing the interested parties. (Luciani, rule 458.)

[3] i.e., a larger fraction than the $\frac{1}{3}$ he would receive in his capacity of sharer.

[4] As an agnate.

the share of $\frac{1}{6}$ and not for the $\frac{1}{3}$ of the residue : $\frac{1}{3}\{1-(\frac{3}{24}\times\frac{16}{24})\}=\frac{5}{72}$; nor to divide the residue along with the brother : $\frac{1}{2}\{1-(\frac{3}{24}\times\frac{16}{24})\}=\frac{5}{48}$.

2nd Example. The deceased leaves his mother, paternal grandfather, and ten brothers :

The mother as sharer receives . . $\frac{1}{6}$ or $\frac{3}{18}$
The grandfather as sharer of $\frac{1}{3}$ of the residue receives . . . . . $\frac{1}{3}(1-\frac{1}{6})$ or $\frac{5}{18}$
The brothers, the residue . . . or $\frac{10}{18}$

As a sharer of $\frac{1}{6}$ of the succession, the grandfather would only have received $\frac{3}{18}$; or as an agnate along with the brothers, only $\frac{1}{11}(1-\frac{1}{6})=\frac{5}{66}$.

3rd Example. The deceased leaves his paternal grandfather, his paternal grandmother, and a brother german or consanguinean.

The grandmother as sharer receives . $\frac{1}{6}$ or $\frac{2}{12}$
The grandfather as agnate dividing along with the brothers receives . . $\frac{1}{2}(1-\frac{2}{12})$ or $\frac{5}{12}$
The brother, the residue . . . $\frac{5}{12}$

As a sharer of $\frac{1}{6}$ of the succession, the grandfather would only have received $\frac{2}{12}$; or as a sharer of $\frac{1}{3}$ of the residue, only $\frac{1}{3}(1-\frac{2}{12})=\frac{10}{36}$.

4th Example. The deceased leaves two daughters, a grandfather, and a brother german or consanguinean.

The daughters as sharers receive . . . $\frac{2}{3}$ or $\frac{4}{6}$
The grandfather as sharer of $\frac{1}{6}$, or as an agnate dividing along with the brother : $\frac{1}{2}(1-\frac{4}{6})=\frac{1}{6}$; in either case receives . . . . . $\frac{1}{6}$
The brother, the residue . . . . . $\frac{1}{6}$

As a sharer of $\frac{1}{3}$ of the residue, the grandfather would only have received $\frac{1}{3}(1-\frac{4}{6})=\frac{1}{9}$.

5th Example. The deceased leaves his mother, his paternal grandfather, and two brothers.

The mother as sharer receives . . . . $\frac{1}{6}$ or $\frac{3}{18}$
The grandfather as sharer of $\frac{1}{3}$ of the residue : $\frac{1}{3}(1-\frac{3}{18})=\frac{5}{18}$; or as an agnate dividing along with the brothers : $\frac{1}{3}(1-\frac{3}{18})=\frac{5}{18}$; in either case receives . . . . . $\frac{5}{18}$
The two brothers, the residue . . . . . $\frac{10}{18}$

As a sharer of $\frac{1}{6}$ of the succession the grandfather would only have received $\frac{3}{18}$.

6th Example. The wife dies and leaves her husband, paternal grandfather, and three brothers.

The husband as sharer, receives . . . . $\frac{1}{2}$ or $\frac{6}{12}$
The grandfather as sharer of $\frac{1}{6}$ or $\frac{2}{12}$, or as sharer of $\frac{1}{3}$ of the residue : $\frac{1}{3}\times\frac{6}{12}=\frac{2}{12}$; in either case receives . . . . . $\frac{2}{12}$
The brothers, the residue . . . . $\frac{4}{12}$

As an agnate dividing along with the brothers, the grandfather would only have received $\frac{1}{4} \times \frac{6}{12}$ or $\frac{1}{8}$, instead of $\frac{1}{6}$ as above.

7th Example. A wife leaves her husband, her grandfather, and two brothers.

The husband as sharer receives	$\frac{1}{2}$ or $\frac{3}{6}$
The grandfather; either as sharer of $\frac{1}{6}$, or as sharer of $\frac{1}{3}$ of the residue or $\frac{1}{6}$, or as agnate sharing along with the two brothers; in either case receives	$\frac{1}{6}$
The two brothers, the residue	$\frac{2}{6}$

We have not yet finished with the grandfather. There are cases in which in competition with a certain number of sharers his situation becomes considerably modified. Suppose a wife dies, leaving her husband, her mother, her paternal grandfather, and a sister german or consanguinean.

The husband as sharer should receive, . . .	$\frac{1}{2}$
The mother as sharer should receive	$\frac{1}{3}$
The grandfather as sharer should receive . . .	$\frac{1}{6}$
The sister	$\frac{1}{2}$

Now these shares are fixed by the Korân and cannot be modified. Hence the trouble; for the total of these shares comes to $\frac{9}{6}$ or half more than the whole succession.

It then becomes necessary to proceed by the method of reduction, *'aul*, which consists in changing the denominator of the total fraction to that of the numerator, in this case from 6 to 9 by adding 3, and then, after reducing the shares to a common denominator, in this case 6, reducing them again by adding 3 to the common denominator, making it 9 in every case instead of 6.

The shares above now become:

the husband's	$\frac{1}{2}$ or $\frac{3}{6}$	reduced to	$\frac{3}{9}$
the mother's	$\frac{1}{3}$ or $\frac{2}{6}$	,, ,,	$\frac{2}{9}$
the grandfather's	$\frac{1}{6}$	,, ,,	$\frac{1}{9}$
The sister's	$\frac{1}{2}$ or $\frac{3}{6}$	,, ,,	$\frac{3}{9}$
Total			$\frac{9}{9}=1$

Having arrived at this result, another difficulty presents itself. The grandfather has been deprived of his proper share of $\frac{1}{6}$, and the sister, agnatised by the grandfather, receives more than the senior agnate. To set matters right, the grandfather is arbitrarily supposed to be the brother of the sister and to share along with her in the ratio 2 : 1, as is the rule with agnates of different sexes. Their shares are therefore added together totalling to $\frac{4}{9}$, and the denominator multiplied by 3 in order to give another denominator, 27; which will

permit of the expression of the fraction representing the respective shares of the heirs, which then become :

the husband	$\frac{3}{9}$	$\frac{9}{27}$
the mother	$\frac{2}{9}$	$\frac{6}{27}$
the grandfather		$\frac{8}{27}$
the sister german	$\frac{4}{9}$	$\frac{4}{27}$ [1]
or consanguinean.		

Such is, simplified as far as possible, the theory of the *sharers*. It will be as well to resume in tabular form the situation of each sharer.

Tabular Statement of the Shares

The Husband.

Wife leaving no descendants	$\frac{1}{2}$
Wife leaving descendants	$\frac{1}{4}$

The Daughter.

When alone	$\frac{1}{2}$
When two or more	$\frac{2}{3}$
Along with a brother german or consanguinean	agnatised.

The Daughter of the Son.

When alone	$\frac{1}{2}$
When more than one	$\frac{2}{3}$
Along with a daughter	$\frac{1}{6}$
Along with a brother german or consanguinean	agnatised.
Along with a son's son's son	do.
Along with a son	excluded unless
Along with two daughters	do. agnatised.

The Sister German.

When alone	$\frac{1}{2}$ when no daughters or
When more than one	$\frac{2}{3}$ daughters of sons.
Along with a brother german or consanguinean	agnatised.
Along with a daughter or son's daughter	do.
Along with a paternal grandfather	do.

The Sister Consanguinean.

When alone	$\frac{1}{2}$	When no daughters,
When more than one	$\frac{2}{3}$	son's daughters, or
Along with a sister german	$\frac{1}{6}$	sisters german.

[1] This particular case is known as *al-akdâriyyah* because it 'mars' or contradicts the principles of succession laid down by the jurist Zaid b. Thâbit. (Luciani, p. 364.)

Along with a brother consanguinean	excluded	agnatised.
,, ,, a paternal grandfather		do.
,, ,, a daughter or son's daughter . . .		do.
,, ,, a brother german . . .		unless agnatised.
,, ,, two sisters german . . .		

The Wife.

Without descendants . . .	$\frac{1}{4}$	Whether the deceased has left one or more wives.
With descendants	$\frac{1}{8}$	

The Mother.

When the deceased has left no descendants nor more than one brother, nor more than one sister.	$\frac{1}{3}$	The mother is not excluded by the existence of the father.
Where the deceased has left a descendant or two or more brothers and sisters.	$\frac{1}{6}$	
In the case of the 'two deceptions'.	$\frac{1}{3}$ of the remainder.	

The Brother Uterine.

When alone.	$\frac{1}{6}$
When more than one	$\frac{1}{3}$
Along with the father or the grandfather, the son or the daughter, the grandson or granddaughter . .	excluded.

The Sister Uterine.

When alone.	$\frac{1}{6}$
When more than one	$\frac{1}{3}$
Along with the father or the grandfather, the son or the daughter, the grandson or granddaughter. . .	excluded.

The Father.

When the deceased leaves no descendants . . .	$\frac{1}{6}$
Along with a male descendant	$\frac{1}{6}$
Along with a daughter or granddaughter . . .	$\frac{1}{6}$ and the residue; in his double capacity as a sharer and residuary.

The Paternal Grandfather.

Along with the father	excluded.
When the deceased leaves no descendants . . .	$\frac{1}{6}$
,, ,, ,, ,, a male descendant . .	$\frac{1}{6}$
,, ,, ,, ,, a daughter or a granddaughter . . .	$\frac{1}{6}$ and the residue; (double capacity).
Along with brothers or sisters german or consanguinean .	option;

(except in the case when he is along with one german and consanguineans, etc.).

The Paternal Grandmother.

Along with the father	excluded.

The Maternal Grandmother.

Along with the mother	excluded.
Along with a descendant	$\frac{1}{6}$
Along with the paternal grandmother	$\frac{1}{6}$ divided.

Section III

The Agnates or Residuaries

Sub-section 1. General remarks.

The *ʿaṣabah* are the male relations on the father's side, and the word may be literally rendered by the word agnates, borrowed from Roman Law.

The agnates are those who, after the sharers have received the shares attributed to them by the Korân, divide the residue of the succession, if any remains.

Muhammadan authors divide agnates into three categories: (*a*) *agnates in their own right:* these are the true agnates, the males; e.g., the son, the son's son, the father, the paternal grandfather, the brother german, the brother consanguinean;—(*b*) *agnates with another:* these are the women who are agnatised by the existence of another female heir or heirs, such as the sister along with the daughter or the son's daughter;[1]—(*c*) *agnates by another:* these are one or the other of the four female heirs who have a right as sharer to the $\frac{1}{2}$, but who are agnatised when along with a brother of the same class, degree and blood.

If forced to, one can imagine that a brother may ingraft his own capacity upon his sister of the same strength of blood; but it is more difficult to understand why a sister and a daughter, who are each sharers when standing alone, should become agnatised when standing together. God is all wise! say the Muslims when in the presence of a problem which they cannot solve. Let us imitate them.

Sub-section 2. Precedence of the agnates.

The agnates are:

(1) The son, who agnatises his sister.

(2) The son's son, who also agnatises his sister.

(3) The father, in default of descendants of the deceased; for if along with a son or grandson, he becomes a sharer of $\frac{1}{6}$, the son or grandson remaining an agnate. But if, on the contrary, the father is

[1] Cf., *Risâlah*, appendix K, p. 109.

along with a daughter or granddaughter, he ranks both as sharer and agnate.

(4) The grandfather, in default of the father.

(5) The brother german, who is not necessarily excluded by the existence of the grandfather.

(6) The brother consanguinean, who also is not necessarily excluded by the existence of the grandfather, and who is treated as a brother german in the absence of the latter ; except in the case known as *al-mushtarakah*,[1] which will now be explained.

Suppose a woman's heirs are : her husband, her mother or grandmother, two or more brothers uterine, a brother german or several brothers and sisters german (but not all sisters). Then :

the husband's share is	$\frac{1}{2}$ or $\frac{3}{6}$
the mother's ,, ,, ...	$\frac{1}{6}$ or $\frac{1}{6}$
the brothers uterine	$\frac{1}{3}$ or $\frac{2}{6}$

which makes up the total succession ; and the germans, though much nearer heirs, are excluded by the fact that they are agnates, whilst the brothers uterine are sharers.

The story is that in the early days of Islâm the germans thus voiced their complaint :—' What ! we have the same mother as our brothers uterine ; even supposing our own father was but a donkey, he at least, is the means of making us brethren.' This appeared so just that it was decided that after deducting the shares of the husband and mother, or $\frac{4}{6}$, the remainder should be divided equally between the brothers and sisters german [2] and the brothers uterine without distinction of sex.

This solution then only profits the germans ; the consanguineans, who otherwise are treated as germans, cannot claim to be treated under this rule. They are thus excluded ; as they are by the existence of a sister german when the latter is agnatised along with others by one or more daughters, or by one or more son's daughters.[3]

(7) The sons of brothers german or consanguinean in default of their own fathers ; the son of a brother german excluding the son of a brother consanguinean.

(8) The uncle german.

(9) The uncle consanguinean.

(10) The granduncle, brother of the paternal grandfather ; each class excluding the next,[4] in spite of nearer degree of relationship and of greater strength of blood, though the german always excludes the consanguinean of the same class.[5]

[1] Or ' Participation.' (*Risâlah*, Appendix M, p. 112.)

[2] This is the only case in which brothers german are considered to be sharers.

[3] See p. 376.

[4] ' Class must in first place be preferred ; degree comes next, and blood is third.' (*Risâlah*, Appendix L, p. 110.) This is al-Jabari's rule. Cf., Luciani, pp. 263, 285.

[5] Khalîl's enumeration of agnatic heirs extends to the fifth degree, but is not necessarily a limiting one ; for he does not include such undoubted heirs as the great-grandson, grandnephews, cousins or uncles. Cf., Luciani, pp. 292 et sq.

(11) The patron, where the deceased was an enfranchised slave. In default of other successors, the patron takes the whole succession; if there are sharers, he comes after the distribution of the shares.

(12) The *Bait al-mâl*, a true agnate, which receives the whole succession in default of sharers and other agnates, or else the residue, if any, when these have been satisfied.[1]

Section IV

Of the Double Capacity as Sharer and Residuary

We have seen that certain heirs combine in themselves the capacity of both sharer and agnate or residuary. They are:

A. *The father*, when along with one or more daughters or son's daughters. In such a case he is a sharer of $\frac{1}{6}$, and after all the sharers have been satisfied he divides the residue along with other agnates.

B. *The paternal grandfather*, under the same conditions as in A.

C. *The son of the paternal uncle*, when he is at the same time the brother uterine of the deceased.[2] As a sharer he receives $\frac{1}{6}$, and after the sharers have been satisfied, he receives the residue as an agnate. If along with the son of another paternal uncle who is not the brother uterine, then the two cousins divide the residue between them. If, again, the son of the paternal uncle is at the same time the widower of the deceased,[3] he takes $\frac{1}{2}$ as sharer and the residue as an agnate; unless, of course, he finds himself along with another successor, or altogether excluded by one of higher standing.

We have now studied the list of sharers and agnates; there remain the following questions in order to complete this summary of the Law of Succession: (1) the bases of division; (2) the exclusion of heirs; (3) the adjournment of the division; (4) modifications in the original division; (5) the conditions under which an heir may relinquish his rights in consideration of some determined chattel being allotted to him.

Section V

The Bases of Division

Sub-section 1. General remarks.

The calculations required in order to divide the *mîrâth* among the

[1] 'The Mâliki School differs from those of Abu Ḥanîfah and al-Shâfi'i in not granting the position of heirs under any circumstances to relatives other than the sharers and agnates.' (*Risâlah*, note 277.) Thus in Mâliki Law the Ḥanafi doctrines of 'distant kindred' and of 'return' are not known. Cognates can therefore never succeed.

The Shâfi'i School only follows the Ḥanafi doctrine when the *Bait al-mâl* is considered to be badly administered. (Luciani, p. 518.)

[2] This happens when two brothers marry in succession the same woman and each has a child by her. The children are at the same time cousins through their fathers and brothers uterine through the mother.

[3] i.e., a man who has married his cousin.

heirs are often difficult and complicated when one tries to follow the Arab methods. It will, however, be as well to follow these methods in order to exhibit the Muhammadan characteristics which are proper to the subject.[1]

Sub-section 2. The bases of division.

As everything is sacramental in the matter of succession, the Muslim authors have admitted a certain number of bases,[2] each one of which must be employed whenever certain sharers are to be satisfied. The use of the particular base is to assure the division of unity without leaving a remainder.

There are seven such bases or denominators:

2, 4, 8, 3, 6, 12, 24.

A. *Two.* The base of two is known in Arabic as 'the two orphans.' It is used whenever the heirs are sharers of $\frac{1}{2}$ each, or of a sharer of $\frac{1}{2}$ and an agnate who takes the residue. Sharers of $\frac{1}{2}$ would be:—a surviving husband with a sister german. A sharer of $\frac{1}{2}$ along with an agnate would be:—the surviving husband along with the brother german or consanguinean.

B. *Four.* This base is employed in the following cases: (1) when there is a sharer of $\frac{1}{4}$ and an agnate taking the residue; (2) when there is a sharer of $\frac{1}{4}$, another of $\frac{1}{2}$, and an agnate taking the residue; (3) when there is a sharer of $\frac{1}{4}$, another receiving the third of the residue and an agnate taking the balance remaining.

Examples are: (1) and (2): the surviving spouse, sharer of $\frac{1}{4}$; along with a daughter, sharer of $\frac{2}{4}$; and a brother taking the remaining $\frac{1}{4}$ as an agnate. (3): the widow along with the father and mother; the widow receives $\frac{1}{4}$, the father $\frac{2}{4}$ and the mother $\frac{1}{4}$. Stated this way the case is simple, but in Law, the example is the first case of al-Gharrâ'ân,[3] where the widow alone is the sharer of $\frac{1}{4}$, the mother receives the third of the remainder, and the father the balance of the whole succession as an agnate. It would be much more simple to say that the father agnatises the mother and that he divides the residue, i.e., $\frac{3}{4}$, with her in the ratio 2 : 1, but then this method of statement would not be that of Muhammadan Law.

C. *Eight.* This figure is the denominator used whenever there is a sharer of $\frac{1}{8}$ and agnates; or a sharer of $\frac{1}{8}$, one of $\frac{1}{2}$, and agnates.

Thus a widow in competition with a son receives as sharer $\frac{1}{8}$, the son as agnate taking the remainder. Again a widow along with a daughter and a brother: the widow and daughter are respectively sharers of $\frac{1}{8}$ and $\frac{4}{8}$; the brother takes the remainder, $\frac{3}{8}$.

[1] See however p. 393, note 2.
[2] Or denominators of fractions.
[3] See p. 378, note 2.

D. *Three.* Three is the denominator when : (1) the sharers are of $\frac{1}{3}$, as in the case of brothers uterine, receiving $\frac{1}{3}$, along with sisters consanguinean receiving $\frac{2}{3}$; or (2) when there is a sharer of $\frac{1}{3}$ and an agnate taking the remainder, as in the case of a mother and brother ; or (3) when there are sharers of $\frac{2}{3}$ and an agnate, as in the case of two daughters, sharers of $\frac{2}{3}$, and a paternal uncle taking the remainder as agnate.

E. *Six.* Six is the denominator used when the heirs are : (1) a sharer of $\frac{1}{6}$, and an agnate ; (2) of $\frac{1}{6}$ and of $\frac{1}{3}$, and an agnate ; (3) of $\frac{1}{6}$, and of $\frac{2}{3}$, and an agnate ; (4) of $\frac{1}{2}$, and of $\frac{1}{3}$, and an agnate.

Examples : (1) A grandfather, taking as sharer $\frac{1}{6}$, and a son taking the remainder as agnate.

(2) A grandmother and two brothers uterine, taking $\frac{1}{6}$ and $\frac{1}{3}$ respectively as sharers, along with a brother consanguinean taking the remainder, $\frac{3}{6}$, as an agnate.

(3) A mother and two daughters, respectively sharers of $\frac{1}{6}$ and $\frac{2}{3}$, along with a brother taking the remainder, $\frac{1}{6}$, as an agnate.

(4) A sister and a mother, respectively sharers of $\frac{1}{2}$ and of $\frac{1}{3}$, along with a son of a brother who takes the remainder, $\frac{1}{6}$, through being agnatised.

F. *Twelve.* This number is used as the denominator when the heirs are : (1) sharers of $\frac{1}{4}$, and of $\frac{1}{6}$, and an agnate ; or (2) of $\frac{1}{4}$, $\frac{1}{3}$, and an agnate.

Examples : (1) A widower receiving $\frac{1}{4}$ or $\frac{3}{12}$, a mother receiving $\frac{1}{6}$ or $\frac{2}{12}$, along with a son who takes the remainder, $\frac{7}{12}$.

(2) A widow receiving $\frac{1}{4}$ or $\frac{3}{12}$, a mother receiving $\frac{1}{3}$ or $\frac{4}{12}$, along with a brother who takes the remainder $\frac{5}{12}$. So also a widower receiving $\frac{1}{4}$ or $\frac{3}{12}$, two daughters receiving $\frac{2}{3}$, or $\frac{8}{12}$, along with a brother who takes the remainder, $\frac{1}{12}$.

G. *Twenty-four.* The number twenty-four is used when the succession is to be divided ; (1) into an $\frac{1}{8}$th, a $\frac{1}{6}$th, and a remainder ; or (2) into an $\frac{1}{8}$th, $\frac{2}{3}$rd, and a remainder.

Examples : (1) A widow, mother, and son. The widow is a sharer of $\frac{1}{8}$ or $\frac{3}{24}$, the mother of $\frac{1}{6}$ or $\frac{4}{24}$, and the son as agnate takes the remainder or $\frac{17}{24}$.

(2) A widow, two daughters and a brother. The widow as sharer receives $\frac{1}{8}$ or $\frac{3}{24}$, the two daughters $\frac{2}{3}$ or $\frac{16}{24}$, and the brother as agnate takes the remainder, $\frac{5}{24}$.

H. Some authors admit two other bases, 18 and 36. But it is evident that 18 is included under the base 6, and 36 under 12.

Example of 18 *as the denominator :* the deceased leaves a mother, grandfather, and four brothers german or consanguinean. The mother as sharer receives $\frac{1}{6}$. There remains $\frac{5}{6}$ for the grandfather and brothers. The former chooses the third of the remainder, for this course is the most advantageous for him. But the fraction $\frac{5}{6}$ is not divisible by

3; both terms are therefore multiplied by 3, giving $\frac{15}{18}$ and the grandfather takes $\frac{5}{18}$; the remainder, $\frac{10}{18}$, being divided among the four brothers.[1]

Example of 36 *as the denominator*: the deceased leaves his mother, his widow, grandfather and four brothers. The base is then 12. The mother receives $\frac{1}{6}$ or $\frac{2}{12}$; the widow $\frac{1}{4}$ or $\frac{3}{12}$; there remains $\frac{7}{12}$. The grandfather chooses the third of the remainder. Both terms of the fraction $\frac{7}{12}$ are therefore multiplied by 3 and the grandfather takes $\frac{7}{36}$, the four brothers taking the remainder, $\frac{14}{36}$.

J. It goes without saying that these bases are only used when there are sharers. For the agnates, whether they take the whole of the succession, or the remainder after deduction of the shares, the base of the division is their total number, each male heir counting as two and each female as one. The only exception to this rule is that known as *al-Mushtarakah*, or 'participation.'[2]

Sub-section 3. Of 'Reduction.'

When in any given case the sum of the fractions of the shares is greater than unity, each share undergoes a proportional reduction by the process known as *'aul*.[3] Thus the base 6 may be reduced to 7, 8, 9 or 10; the base 12, to 13, 15 or 17; the base 24 to 27.

A. *Examples of reduction of base* 6.

(1) The deceased leaves a widower and two sisters german or consanguinean. The widower receives $\frac{1}{2}$ or $\frac{3}{6}$, the sisters $\frac{2}{3}$ or $\frac{4}{6}$; total $\frac{7}{6}$. To reduce to unity, the denominator is increased by 1, thus giving $\frac{3}{7}$ to the widower and $\frac{4}{7}$ to the sisters.

(2) The deceased leaves a widower, a mother, and a sister german or consanguinean. The widower receives $\frac{1}{2}$ or $\frac{3}{6}$, the mother $\frac{1}{3}$ or $\frac{2}{6}$, the sister $\frac{1}{2}$ or $\frac{3}{6}$; total $\frac{8}{6}$. To reduce to unity, 2 must be added to each denominator and the widower receives $\frac{3}{8}$, the mother $\frac{2}{8}$, the sister $\frac{3}{8}$;—total 1.

(3) The deceased leaves the widower, mother, and three sisters of different blood. The widower receives $\frac{1}{2}$ or $\frac{3}{6}$, the sister german $\frac{1}{2}$ or $\frac{3}{6}$, the sister consanguinean $\frac{1}{6}$, the sister uterine $\frac{1}{6}$, and the mother $\frac{1}{6}$; total $\frac{9}{6}$. In the case of each share, the denominator is increased by 3 to make it 9 instead of 6.

(4) The deceased leaves the widower, a sister german, a sister consanguinean, the mother, and two brothers uterine. The widower then receives $\frac{1}{2}$ or $\frac{3}{6}$, the sister german $\frac{1}{2}$ or $\frac{3}{6}$, the sister consanguinean $\frac{1}{6}$, the mother $\frac{1}{6}$, the two brothers uterine $\frac{1}{3}$ or $\frac{2}{6}$; total $\frac{10}{6}$. In the case of each share the denominator must be increased by 4 to make it 10 instead of 6.

[1] For method of dividing this fraction among the four brothers see p. 393.
[2] See p. 388.
[3] See p. 375, note 1.

B. *Examples of reduction of base of* 12.

(1) The deceased leaves the widower, mother, and two daughters. The widower receives $\frac{1}{4}$ or $\frac{3}{12}$, the mother $\frac{1}{6}$ or $\frac{2}{12}$, the two daughters $\frac{2}{3}$ or $\frac{8}{12}$; total $\frac{13}{12}$. The denominator of each share must be changed to 13.

(2) The deceased leaves the widower, the father and mother, and two daughters. The widower receives $\frac{1}{4}$ or $\frac{3}{12}$, the father $\frac{1}{6}$ or $\frac{2}{12}$, the mother $\frac{1}{6}$ or $\frac{2}{12}$, the two daughters $\frac{2}{3}$ or $\frac{8}{12}$; total $\frac{15}{12}$. The denominator of each share must be changed to 15.

(3) The deceased leaves a widow, mother, and sister german, a sister consanguinean, and two sisters uterine. The widow receives $\frac{1}{4}$ or $\frac{3}{12}$, the mother $\frac{1}{6}$ or $\frac{2}{12}$, the sister german and the sister consanguinean together receive $\frac{2}{3}$ or $\frac{8}{12}$, and the two sisters uterine $\frac{1}{3}$ or $\frac{4}{12}$; total $\frac{17}{12}$. The denominator of each share must be changed from 12 to 17.

C. *Example of the base* 24 *being reduced to* 27.

The deceased leaves a widow, two daughters, the father and mother. The widow receives $\frac{1}{8}$ or $\frac{3}{24}$, the two daughters $\frac{2}{3}$ or $\frac{16}{24}$, the father $\frac{1}{6}$ or $\frac{4}{24}$, and the mother $\frac{1}{6}$ or $\frac{4}{24}$; total $\frac{27}{24}$. The denominator of each share must be changed from 24 to 27.

Sub-section 4. Reduction of the fractions,[1] *radd*.

The cases to be now discussed are those where the numerator of the fraction representing the share is not divisible among the co-sharers in that particular category. Thus in the last example where the widow receives $\frac{3}{27}$, suppose there were four widows: 3 is not divisible by 4.

The rule [2] is: that where the numerator of the fraction representing the share of any one category of sharers, is not divisible by the number of co-sharers in that category, then the lowest common denominator of the numbers of co-sharers in each category is obtained, and both terms of each of the fractions representing the share of each category of sharers is multiplied by this lowest common denominator.

Thus, for example, in the simplest case where *radd* is necessary in one category only. A succession is to be divided among a widow, share $\frac{1}{4}$, and six brothers consanguinean, share $\frac{3}{4}$. The numerator of $\frac{3}{4}$ is not divisible by 6. As there is but one category of co-sharers, all that we have to do is to multiply both terms of each fraction by 6. The widow's share is thus $\frac{6}{24}$ or $\frac{2}{8}$, the brothers' share is thus $\frac{18}{24}$ or $\frac{6}{8}$, or $\frac{1}{8}$ to each of the six brothers.

Suppose the heirs are: the mother with a share of $\frac{1}{3}$, along with

[1] A better heading would be: 'Calculation of the individual shares,' for there is no question of reducing the fraction as in *'aul*, but of transforming it.

[2] The jurists work these cases out in a far more complicated way than is here given. The rule for *radd* has been deduced from the examples and covers all of them; Luciani, following the jurists, gives several rules.

three paternal uncles taking the remainder, $\frac{2}{3}$. By the rule the fractions are changed to $\frac{3}{9}$ and $\frac{6}{9}$, and each of the uncles gets $\frac{2}{9}$.

Suppose the heirs are: a widow, receiving a share of $\frac{1}{4}$, and two paternal uncles taking $\frac{3}{4}$. The widow will then receive $\frac{3}{7}$ and the uncles $\frac{6}{8}$ or $\frac{3}{4}$ each.

Another example with reduction, *'aul*: the deceased leaves the widower whose share is $\frac{1}{2}$ or $\frac{3}{6}$, and five sisters german, whose share is $\frac{2}{3}$ or $\frac{4}{6}$. Total $\frac{7}{6}$. The husband's share must be reduced to $\frac{3}{7}$ and the sisters' to $\frac{4}{7}$. Then by transforming the fraction, *radd*, the husband's share becomes $\frac{3\times5}{7\times5}=\frac{15}{35}$, and the sisters' $\frac{4\times5}{7\times5}=\frac{20}{35}$ or $\frac{4}{35}$ to each sister.

Examples are now given of more than one category of co-sharers.[1]

Example 1. The deceased leaves four widows and five sons. The widows' share is $\frac{1}{8}$ and the sons take the remainder $\frac{7}{8}$. The lowest common denominator of 4 and 5 is 20; the new denominator then becomes 160, and the widows receive $\frac{20}{160}$, or each $\frac{5}{160}$; and the five sons $\frac{140}{160}$ or each $\frac{28}{160}$.

Example 2. The deceased leaves his mother, four brothers uterine, and eight sisters german.

The mother's share by reduction is	$\frac{1}{7}$
The 4 brothers' uterine by reduction is . . .	$\frac{2}{7}$
The 8 sisters' german by reduction is . . .	$\frac{4}{7}$

The lowest common denominator of 4 and 8 is 8. Multiplying both terms of the fractions representing the shares by 8, we get:

Mother's share	$\frac{8}{56}$ or $\frac{2}{14}$
4 brothers' share	$\frac{16}{56}$ or $\frac{4}{14}$
8 sisters' share	$\frac{32}{56}$ or $\frac{8}{14}$

Example 3. The heirs are: a grandfather, $\frac{5}{18}$; two grandmothers, $\frac{3}{18}$; and six brothers german or consanguinean, $\frac{10}{18}$. The lowest common denominator of 2 and 6 is 6 and the new base then becomes $18\times6=108$.

Example 4. The heirs are: four widows, $\frac{1}{4}$ or $\frac{9}{36}$; the mother, $\frac{1}{6}$ or $\frac{6}{36}$; a grandfather, $\frac{7}{36}$; along with twelve brothers german or consanguinean, $\frac{14}{36}$. The lowest common denominator of 4 and 12 is 12, and the new base becomes $36\times12=432$.

Example 5. The heirs are: two grandmothers, $\frac{1}{6}$; three brothers uterine, $\frac{1}{3}$ or $\frac{2}{6}$; along with five uncles taking the remainder, $\frac{3}{6}$. The lowest common denominator of 2, 3 and 5 is 30, and the new base for the division then becomes $6\times30=180$.

[1] The examples are taken from Luciani, p. 402 et sq. They are worked out in accordance with the rule given on p. 393 and not by the methods of the jurists as set forth by Luciani.

SECTION VI

EXCLUDED HEIRS

The following heirs[1] are excluded from inheriting:

(*a*) The husband who has proceeded against his wife by way of *liʿân*, if she has affirmed her innocence by taking five oaths. If she has refused to take the oaths and is consequently convicted of adultery, the husband retains his right to her succession.

(*b*) The wife against whom *liʿân* has been pronounced.

(*c*) The child in the succession of the father, if the latter has disavowed paternity by way of *liʿân*.

(*d*) The murderer of the deceased or one who has inflicted wounds without the intention of killing.

Involuntary homicide is no cause for exclusion; but the heir who involuntarily caused the death of the deceased may not share in the *diyah*. Murder committed by a minor or a lunatic is always considered to be involuntary homicide.

(*e*) Difference of religion is always a cause of exclusion.[2] A Muslim cannot inherit from an apostate, a Christian or a Jew, or *vice versa*.[3] In the case of Christians and Jews inheriting each from their co-religionists, the Ḳâḍi is bound to take the advice of the Bishop or Rabbi with regard to their own laws of succession.[4]

(*f*) Lack of evidence as to survival is also a cause of exclusion. Thus, suppose the case where a man, his wife and three sons have been involved in a catastrophe. The husband leaves his father and a second wife; the first wife leaves a child by another husband. The surviving widow receives a share of $\frac{1}{4}$, and his father takes the remainder, $\frac{3}{4}$, as an agnate. The child of the deceased wife receives his mother's succession, as well as $\frac{1}{6}$ of the succession of his three brothers uterine.

There are thus three distinct successions to be liquidated: (1) that of the deceased husband; (2) his wife; and (3) the three deceased sons; husband, wife and sons being considered as complete strangers one to the other.

[1] Slaves are not here included, as it goes without saying that a slave, of no matter what category, cannot inherit, nor can his heirs inherit from him.

[2] The Infidel is he who has broken the tie which united him to God: that is why God has broken all hereditary ties between him and the Believer. (Quoted by Luciani, p. 150.)

[3] It is of interest to note that in 1854 the Court of Appeal at Algiers upheld Muhammadan Law in the case of two Jewesses; but in 1876 the same Court decided that a Muhammadan wife of an Italian, who had become a Christian, was apt to inherit from her Muhammadan mother. For text of the judgments and comments thereon, see Luciani, pp. 154 et sq.

[4] But not so in the case of an apostate. In his case he can neither inherit nor be inherited from. (Luciani, p. 161). The *zindîḳ* or atheist is assimilated to the apostate. (Id. p. 164.)

Section VII

Of the Postponement of Division

The division of a succession is postponed in the following cases: where the widow of the deceased is pregnant, or deceased's brother's wife, or deceased's son's wife, or deceased's remarried mother.[1]

In the case of an heir who has disappeared and it is not known whether he is living or dead: the final division of the succession is postponed until his death is proved or until there is legal presumption of death, that is, when the absent heir should have reached the age of seventy-five years.

In such a case, the liquidation of the succession is proceeded with under the double hypotheses of the absent heir's life and death.

For example: a woman dies, leaving her mother, sister, husband, and father who has disappeared.

On the hypothesis that the father is alive:

the husband	$\frac{1}{2}$ or $\frac{3}{6}$
the mother, the third of the remainder	$\frac{1}{6}$
the father	$\frac{1}{3}$ or $\frac{2}{6}$
the sister	excluded.

On the hypothesis that the father is dead:

the husband	$\frac{1}{2}$ or $\frac{3}{6}$	reduced to	$\frac{3}{8}$
the sister	$\frac{1}{2}$ or $\frac{3}{6}$	,, ,,	$\frac{3}{8}$
the mother	$\frac{1}{3}$ or $\frac{2}{6}$	,, ,,	$\frac{2}{8}$

The two sets of fractions are then expressed in the terms of their lowest common denominator, in this case 24, and a first division is made on the following basis:

the husband	$\frac{9}{24}$
the mother	$\frac{4}{24}$
in reserve	$\frac{11}{24}$

If the father, later on, proved to be alive, he will receive $\frac{8}{24}$ held in reserve, and the husband an additional $\frac{3}{24}$. If proved to be dead, the sister will receive $\frac{9}{24}$ of the $\frac{11}{24}$ in reserve and the mother an additional $\frac{2}{24}$.

Section VIII

Of Modifications which may be brought about in the Division

The original division of a succession may be modified by the death of an heir before he has received his share of the division, or by an heir declaring a third party to be a relation of the deceased of the same blood as himself.

[1] Example: the deceased's heirs are his remarried mother pregnant by her second husband, and his father. If the mother bore twins, deceased's brothers uterine, her share would only be $\frac{1}{6}$, instead of $\frac{1}{3}$ if one child was born. The father's participation will likewise be affected; cf., Luciani, p. 461.

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In the first case the share of the deceased heir devolves on his own heirs; in the second case the share of the third party is taken exclusively from that of the heir who has averred the relationship, in the event of the other heirs contesting the relationship.

Section IX

Of Valuation

It is often necessary to know the value of a chattel with reference to the other things comprising the succession. The method is as follows:—Let us suppose an estate to comprise various chattels whose value is estimated, as well as a garden whose value is not estimated. Suppose the base of the division to be 27 and that one heir, whose share is $\frac{4}{27}$, is willing to take the garden as his share. The remainder of the chattels comprising the estate, which have been estimated, are thus considered to be $\frac{23}{27}$th of the whole estate and consequently that $\frac{1}{23}$rd of these estimated chattels is the equivalent of $\frac{1}{27}$th of the whole estate; the estimated value of the garden is therefore $\frac{4}{23}$rd of the estimated portion of the estate.

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GLOSSARY OF ARABIC TERMS

Âbiḳ : a runaway slave ; one who has run away without specific motive ; cf., *harab.*

Adâ' : bailment.

Adab : polite learning.

Aḍḥâ, collective ; *iḍḥiyya :* sacrifice.

Adhân : call to prayer.

ʿAdl, pl. *ʿudûl :* honourable, cf., *shâhid.*

ʿAdl riḍâ : name of formula used when accrediting a witness.

Ahl al-Kitâb : people with a written revelation ; i.e., Christians, Jews and Magians.

Ajar : hire ; see also *ijâra.*

ʿAḳîdah : article of belief.

ʿAḳîḳah : the sacrifice on the seventh day after birth.

ʿÂḳilah : relations liable to pay the bloodwit ; the male heirs ; hence the guild, the tribe ; cf., *ʿâṣib.*

Amân : promise by the Commander to spare the enemy.

Amânât : deposits on trusts ; securities ; a name given to a branch of the civil law.

ʿÂmil : the agent in a Ḳarḍ contract.

Anti (ṭâliḳ) battah : ' thou art divorced thrice,' i.e., irrevocably.

ʿAriyyah : a gratuitous loan of a specified chattel.

ʿÂṣib, pl. *ʿaṣabah :* agnates.

Aṣl : root, principle ; the normal state of things.

ʿAṣr (ṣalât al-) : the afternoon prayer.

ʿAtâḳ : unconditional enfranchisement.

ʿAul : reduction of fractions in successions.

Bâghi : rebellion.

Baiʿ : sale.

Bâ'in : repudiation under which the woman cannot be taken back without a new contract.

Bait al-mâl or *bait mâl-al-muslimîn :* treasury.

Bait al-ṣadaḳah : department of the alms in the treasury.

Batt : an irrevocable repudiation necessitating consummated remarriage on the part of the woman with a third party, before the first husband, who repudiated her, can remarry her.

Ḍamân : guaranty.

Dâr al-ḥarb : abode of war ; the country of Unbelievers between whom and Muslims there is no peace ; cf., *ḥarbi.*

Dâr al-Islâm : abode of Islâm ; Muslim territory.

Dhimmi : protected Infidel subjects of Islâm liable to the capitation tax.

Dîn, al-Dîn : the Religion, i.e., Islâm.

Diyah : bloodwit, mulct for homicide.

Duʿâ : mental prayer or supplication, as distinguished from *ṣalât.*

Fai' : spoil taken in warfare with Unbelievers. A department of the *bait al-mâl.*

Falas : insolvency judicially declared.

Fara'iḍ : shares of inheritance.

Farḍ : an ordinance of Muḥammad.

Fâsiḳ : transgressor of religious obligations.

Fatwa, pl. *fatâwa :* legal decisions given by a *mufti.*

Fi sabîl Allah : in the service of God.

Fidâ' : ransom for a captive.

Fiḳh : jurisprudence.

Ghair al-mashrûʿ : unlawful acts.

Ghanîmah : booty taken in war.

Ghaṣb : usurpation.

Habs, pl. *ḥubûs* : endowment.
Ḥadd : fixed legal punishments.
Ḥadî : sacrifices of cattle at Mecca.
Ḥadîth : traditional sayings of Muḥammad.
Ḥajar as-safîh : legal incapacity ; interdicting a deficient person.
Ḥajj : pilgrimage.
Ḥarab : said of a slave who has run away for some reason ; cf., *âbiḳ*.
Ḥaram : that which is distinctly forbidden.
Ḥarbi : Infidels who have not submitted to Islâm.
Ḥarîm : the appurtenances to certain property, as wells, etc ; affirmative easements.
Ḥaul al-ḥaul : the complete year during which property must have been held in order to be assessable for *zakât*.
Hawâlah : transfer of debts.
Hibah : a gift.
Ḥiḍânah : rearing a child ; the source of certain rights.
Hijrah : the year of the Flight ; the first year of the Muslim calendar, which commences on July 16, 622.
Ḥirz : lawful custody.

Iadar : the question put by the Court : 'have you anything to say.'
ʿIbâdah : devotions.
ʿIddah : waiting term ; prescribed period of delay between women's divorce and remarriage, or death of husband and remarriage.
Ijârah : contract of hire.
Ijmâʿ : consensus of opinion.
Iḳâmah : preparation for prayer.
Iḳhtilâs : forcible seizure of cattle.
Iḳrar : admissions.
Iḳṭaʿ : grant of land by the State on terms ; right of occupancy.
Îlâ' : vow of continence.
Irtidâd : apostasy.
Istibrâ' : term of continence.
Istîlâd : the mother's right to enfranchisement on her master's death.
Istilḥâḳ : admission of paternity.

Jaʿl : conditional agreement.
Jihâd : religious war.
Jinâyah : crimes of violence to the person.
Jizyah : capitation tax.
al-Jumʿah : day of the assembly, i.e., Friday.

Ḳaḍâ : judicial procedure.
Ḳadhf : false accusation of adultery.
Ḳâḍi : judge.
Ḳalâm : scholastic theology.
Ḳarḍ : a loan, not specific, but by number, weight or measure.
Ḳasâmah : oath by heirs of murdered man as to his death.
Khammâs : cultivator.
Kharâj : land tax.
Khirâbah : highway robbery.
Khitân : circumcision.
Khiyânah : breach of trust.
Khula : release from marriage.
Khulsah : forcible seizure.
Kiblah : direction of Mecca towards which the Muslim sets his face in prayer.
Kirâḍ : loan ; dormant partnership ; *commandite*.
Kiṣâṣ : retaliation.
Ḳismah : partition in joint ownership or in inheritance.
Kiṭâʿah : enfranchisement at the master's instance on the immediate payment of the ransom.
Kitâbah : enfranchisement in return for money paid.
Kitâbi, fem. *Kitâbiyah* : a man of the Book ; i.e., a Christian or Jew.
Kiyâs : deducing legal principles.
Kufr : infidelity.

Laḳîṭ : foundling.
Lauth : circumstances which give rise to a strong presumption of truth of allegation.
Liʿân : a form of divorce brought about by the husband accusing his wife on oath of adultery.
Luḳṭah : lost property preserved by a finder.

Makrûh : an act reprehensible, though short of actually unlawful.
Mashsh : madefaction.
Mashrûʿ : that which is lawful.

Mawât : waste land.
Miḥrâb : niche in wall of mosque pointing towards Mecca.
Mîrâth : that part of an estate, less the prior charges, awaiting distribution ; a succession.
Miyârah : charter party.
Mu'adhdhin : the man who calls to prayer.
Mu'âmalât : transactions.
Mubâḥ : allowable.
Mubâra't : separation on release of mutual claims by spouses.
Mudabbir : a slave under a *tadbîr* declaration.
Muddaʿa ʿalaihi : the defendant in an action.
Muddaʿi : the plaintiff in an action.
Muflis : a bankrupt.
Mufsid : a depraved mischievous person.
Mufti : legal assessor.
Mughârasah : a form of contract for planting an orchard.
Muḥabb : an approved act.
Mujtahid : one who deduces from the Law and from traditions principles for the decision of specific cases.
Mukâtib : a slave under a *kitâbah* declaration.
Mu'min : a Believer.
Musâḳât : a contract for the culture of garden plots and division of the produce.
Mustaḥabb : a generally approved act, but not actually enjoined by law.
Mutʿah : a forbidden form of temporary marriage.
Muwaḳḳat : a forbidden form of marriage, based on hire.

Nadhr : a vow.
Nafaḳah : wife's maintenance.
Naḳb : forcible entry.
Nikâḥ : marriage.
Niṣâb : the legal minimum upon which *zakât* may be levied.

Raʿâyah : flock ; hence subjects of the Muhammadan State.
Radd : transformation of the fraction in succession, so as to make it divisible among co-sharers.

Rahn : pledge.
Rakâʿât : prostrations in prayer.
Ribâ : usury.
Riḍâʿ : fosterage.
Rishwah : bribery.
Ruḳba : reciprocal posthumous gifts.
Rûmi : a Greek, European ; term of contempt.

Ṣâda : hunting and fishing.
Ṣadâḳ : dower.
Ṣadaḳah : voluntary alms.
Salam : purchase on description by payment in advance ; a form of sale.
Ṣalât : prayer.
Saraḳah : theft.
Shahâdah : evidence.
Shahâdat ala shahâdah : secondary evidence ; i.e., evidence of hearers of original evidence.
Shâhid : honourable ; cf., *ʿadl.*
Sharb : drink.
Sharîʿah : revealed law.
Sharîf : descendant of the Prophet.
Shirkah : partnership.
Shirkat al-ʿabdân : labour association.
Shirkat al-ʿinân : limited partnership.
Shufʿah : pre-emption.
Ṣulḥ : compromise.
Sunnah : that which was inculcated by Muḥammad.

Taʿadda : unlawful user.
Tadbîr : posthumous enfranchisement.
Taʿdîl : process of accrediting a witness.
Tahârah : ceremonial purity.
Taḥkîm : a marriage where the dower is to be subsequently determined.
Tahlîl : name given to the declaration : ' there is no God but God.'
Taʿjîz : a judicial declaration of forfeiture.
Tajrîḥ : process of discrediting a witness.
Talâḳ : dissolution of marriage.
Taʿwîḍ : a marriage by delegation.
Tayammum : pulveral purification.
Taʿzîr : penalties not fixed by Law, but at the discretion of the judge.

ʿUḳûbât : punishments.
al-ʿUḳûdât : tenets of faith.
ʿUlamâ', sing. *ʿâlim :* doctors of law.

Umm walad : a slave, mother of offspring.
ʿUmra : gift of a life interest.
ʿUmrah : visitation of the holy places.
ʿUrf : customary law.
ʿUshr : tithe.

Wâjib : that which is obligatory.
Wakâlah : agency.
Waḳf : endowment, see *ḥubûs*.
Walâ' : the relation between master and freedman, involving rights and liabilities; patronage.
Walî : a woman's male representative in a marriage contract.
Wâlî : ruler or governor.
Wallâhi : by God!
Waṣiyyah : bequest, legacy.
Wuḍû' : ablution preparatory to prayer.

Yamîn : oath.

Zakât : legal alms.
Ẓihâr : an injurious assimilation involving repudiation.
Zinâ' : fornication.
Zindîḳ : an atheist.

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